Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States

AVIS W. BUTLER,
Petitioner,

v.

COUNTY OF ORANGEBURG, SOUTH CAROLINA, and DONNIE L. HILLIARD, in his individual and official capacities,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, under Title VII to the Civil Rights Act of 1964, 78 Stat. 253, as amended, a senior-level management county employee can recover against her employer for retaliation when the alleged victim of the underlying sexual harassment is her subordinate and the alleged perpetrator of sexual harassment is the employee's supervisor and the Chief Executive Officer of the County, when the senior-level management employee acts principally, in reporting the sexual harassment, upon information witnessed by and received from the supervisor of the alleged victim, but where the senior-level management employee does not witness the main event which gave rise to the senior-level management employee's decision to report the alleged sexual harassment, and when the alleged victim does not complain about the alleged sexual harassment.

II. Whether a county employer violates an employee's procedural due process rights when the employee is fired without notice, denied grivance rights, not disciplined before termniation pursuant to a progressive discipline regulatory scheme, even though the employee has completed the probationary period and inherits regulatory rights to be progressively disciplined and regulatory rights to present grievances associated with her employment.

LIST OF PARTIES

Not required because all parties are identified in the caption.

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IN THE

Supreme Court of the United States

No. ———

AVIS W. BUTLER,

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v.

COUNTY OF ORANGEBURG, SOUTH CAROLINA, and DONNIE L. HILLIARD, in his individual and official capacities,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Citation of the official and unofficial reports of opinion or order: the order from the Court of Appeals is unpublished; therefore, there is no cite in the official and unofficial reporters. The Opinion of the Fourth Circuit Court of Appeals appears at Appendix A, and the Fourth Circuit Court of Appeals rehearing order appears at Ap-

pendix B. The opinion of the United States District Court of South Carolina Columbia Division appears at Appendix C.

JURISDICTION

The order at the Court of Appeals was entered on March 8, 1999. The Court of Appeals order adopted the order entered by the Magistrate Judge on August 3, 1998. The Court of Appeals order denying rehearing is dated April 19, 1999.

The Petitioner was granted an extension to file the Petition by this Court by letter from Melissa A. Blalock, dated July 12, 1999, by order of the Chief Justice. The extension provided that time to file was extended to and including August 17, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article XIV. (App. D, p. 30a).

42 U.S.C. § 2000e-3 (App. D, p. 30a).

Ordinance No. 82-10-15, Division 8, Personnel Policy (App. D, p. 31a).

Statutory provision conferring jurisdiction to review on writ of cert.: 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

In this case, summary judgment was granted for the Respondent employer. Therefore, the facts herein stated are presented in the light most favorable to the Petitioner, the non-moving party.

The Petitioner/employee is Avis W. Butler (sometimes referred to as "Butler"). The employer is the County of Orangeburg ("County"), State of South Carolina. Butler was hired on January 18, 1994, as the Director of Finance

by County. After four and one-half months, Butler was promoted by County to the position of Director of Administrative Services Division. As Director of Administrative Services Division, Butler was responsible for six departments, which included day-to-day responsibility for the Finance Department. Butler reported directly to Donnie Hilliard ("Hilliard"), County Administrator and Chief Executive Officer for the County of Orangeburg. Jannella Shuler ("Shuler") was the Assistant Finance Director, and she reported directly to Butler. Donna Livingston ("Livingston") was a subordinate under Shuler. Livingston Depo. p. 16.

On July 19, 1994, Hilliard gave Butler a directive to administratively demote Livingston. An administrative demotion is given for reasons unconnected to performance, and it is given at the County Administrator's discretion. Butler Depo. pp. 86-88; Butler Depo. Ex. 3, p. 1. On July 20, 1994. Shuler, after learning that Livingston was going to be demoted, came to Butler and lodged a complaint. *Id.* Shuler's verbal complaint alleged that Hilliard was demoting Livingston because he was sexually harassing Livingston. Specifically, Shuler repeatedly complained that it was not right for Hilliard to demote Livingston administratively. At one point in the conversation, Shuler said to Butler: "Avis, something happened on July 18, between Donnie (Mr. Hilliard) and Donna (Ms. Livingston). Butler Depo., Exhibit 3, page 2. As Shuler informed Butler about the July 18th incident between Hilliard and Livingston, her voice began to quiver and she seemed to be getting upset as she repeatedly said, "he just cooked my goose." *Id.* During this same conversation, Shuler stated that Hilliard came to the Finance Department and started talking about a sexual harassment lawsuit that involved a local university. While explaining what had occurred in the lawsuit, Hilliard kissed his finger

with his lips and placed that same finger on Livingston's lips. Shuler further stated: "Avis, Donnie did not just touch his lips gently, but he took his finger and rubbed them around his lips several times (demonstrating in a circular motion) and then he touched Donna's lips." *Id.* Butler asked Shuler what did she and Livingston do after the Hilliard incident. Shuler said that they dispersed immediately. *Id.* During this same conversation, Shuler informed Butler that Hilliard requested to ride in Livingston's car shortly after the "lip-rubbing" incident.

The above-referenced discussion between Butler and Shuler caused both of them to reflect upon other incidents involving Hilliard and Livingston. Butler and Shuler, during this same conversation on July 20, 1994, recalled an incident where Hilliard signaled for Livingston to place her hand inside his hand; Livingston complied only after Hilliard motioned the third time. Shuler indicated that Hilliard rubbed up against or touched Livingston on several occasions. Moreover, Butler mentioned to Shuler that she had witnessed Hilliard rub up against Livingston while they were riding the elevator to Hilliard's office. *Id.* During the elevator incident, Livingston appeared annoyed, but she never said a word. Butler Depo. Ex. 3, p. 2.

Shuler stated to Butler that Livingston was too intimidated to complain about the things that Hilliard was doing to her. Butler Depo. Ex. 3, p. 2.

On the same day, Wednesday, July 20, 1994, that she had the conversation with Shuler, Butler visited Bill Clark's ("Clark") Office, Director of General Services. Clark was responsible for carrying out the personnel functions of the County of Orangeburg. Def. Answers, etc., to Plaintiff's Interrogatories, para. 3. Butler revealed to Clark the information she had received from Shuler con-

cerning the alleged sexual harassment. Clark stated: "Donna now has job security." Butler Depo. Ex. 3, p. 3. Butler had discussed with Clark that same morning the demotion directive received from Hilliard. Clark instructed Butler on the manner that the demotion should be given and the effective date of the demotion. Clark indicated that he would informally discuss the allegations with Hilliard. *Id.*

On Thursday, July 21, 1994, Butler was out of the office all day attending a funeral in another state.

Immediately upon Butler walking into the Finance Department on Friday, July 22, 1994, Shuler stopped Butler to inform her that Hilliard visited the Finance Department on Thursday, July 21, 1994, and he was less than pleasant. On this same day, Hilliard began to curse while inquiring as to who had complained about his behavior to Personnel on the previous day. Shuler had a closed door discussion with Hilliard. App. G, p. 64a; Butler Depo. Ex. 3, p. 3. Butler inferred that Shuler told Hilliard that she had talked with Clark about his behavior because Shuler said Hilliard said some very ugly and unpleasant things about Butler during the closed door discussion. *Id.*

On Friday afternoon, July 22, 1994, as instructed by Clark, Butler and Shuler met with Livingston to discuss her demotion. Before Butler could finish the conversation, Livingston began crying and ran out of Butler's office and the Department. Butler Depo. Ex. 2, p. 11. Butler immediately called Hilliard and told him what had occurred. Hilliard replied that he did not want to see Livingston because he felt that she would file a grievance and that he wanted to remain impartial *Id.* Hilliard sent Ruth van Faussein, his administrative assistant, downstairs to speak with Livingston. On this same day, Friday,

July 22, 1994. Hilliard called Butler and indicated that he wanted to schedule an appointment with her on Monday, July 25th, 1994, at 2:30 p.m. to discuss her six month probationary evaluation. App. G, pp. 64a-65a. When scheduling the above-stated appointment with Butler, Hilliard indicated that he had been praying all last evening (Thursday—the same day he went into the Finance Department and inquired from Shuler the identity of the persons who had complained about his actions; also the same day that he had made the negative comments about Butler). Butler had already completed her probationary period on July 18, 1994, and the County Ordinances provided that probation could not be extended unless a written report was prepared and submitted before the probationary period ended. App. D, pp. 31a-32a. Moreover, Butler had never been counseled or received any derogatory evaluations, written nor verbal, from Hilliard as of July 22, 1994. Until she received the call from Hilliard on July 22, 1994, Butler had never been contacted concerning a forthcoming evaluation. Butler Depo. Ex. 2, p. 3.

During the meeting on Monday, July 25, 1994, Hilliard gave Butler a letter dated July 22, 1994 which indicated that Butler's probationary period was being extended for an additional ninety days. Butler's Depo. Ex. 5. Prior to this evaluation meeting, Butler had never received a single warning or reprimand, in writing nor orally, concerning inadequate performance. To the contrary, before she complained about Hilliard to Clark, her performance had been rated as superb. *Id.*

On September 23, 1994, Butler was terminated by County by letter for eleven alleged reasons. However, only nine reasons were included in Defendant's Motion for Summary Judgment. Contrary to the Order granting Defendants' Motion for Summary Judgment, Butler re-

futed all reasons given for the termination in detail at the trial court level in response to Defendants' Motion for Summary Judgment, and she had previously refuted all allegations on at least two other occasions with supporting documentation. Butler Depo. Exs. 2, 3. The responses are too detailed to set out in this portion of the petition; therefore, the responses, in part, are submitted as part of the appendix pursuant to SCR 14.1(i)(vi). See Appendix E, p. 43a. Butler contends that County's reasons for firing her were pretextual.

After receiving a right to sue letter from the EEOC, Butler filed suit on May 15, 1994, in the United States District Court for the District of South Carolina, alleging that County retaliated against her for reporting the alleged sexual harassment conduct perpetrated by Hilliard on Livingston. Plaintiff requested a jury trial. On July 7, 1994, Butler amended her Complaint to include a section 1983 claim for violation of her Constitutional rights. The Defendants submitted a general denial. See Defendants' Amended Answer. The parties consented to have the matter heard in finality by a United States Magistrate Judge.

Plaintiff conducted extensive discovery. Subsequent to the closing of the discovery period, Defendants filed a motion for summary judgment. Plaintiff timely responded, extensively, to the summary judgment motion.

By written order entered August 3, 1998, the Magistrate Judge granted Defendants' Motion for Summary Judgment on all causes of action. Appendix C, p. 5a.

Petitioner filed timely notice of appeal with the Fourth Circuit Court of Appeals. Jurisdiction at the Court of Appeals was based upon 28 U.S.C. 1331.

REASONS FOR GRANTING THE WRIT

In order to survive a summary judgment motion on her retaliation claim, it is undisputed that Butler was required to submit evidence which created a genuine issue of mateial fact on three issues. *See*, e.g., *Ross v. Communication Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). The three issues include:

> (1) evidence that she was engaged in protected activity;
>
> (2) evidence that the employer took adverse action against her; and
>
> (3) evidence of a causal connection between the protected activity and the adverse action.

Id. at 365. Petitioner's exhaustive research suggests that these three elements are uniformly recognized throughout the federal circuits. *See*, e.g., *Ross* at 355. Additionally, each federal circuit requires the victim asserting a Title VII retaliation "opposition clause" claim to have a reasonable belief that the activity was unlawful under Title VII. However, the circuits differ as to what type of "reasonable belief" the victim must possess in order to meet the first element involving "protected activity". For example, some circuits require the victim to show that she had an objectively reasonable belief that an activity violated Title VII. *See, e.g., Mayo v. Kiwest*, 94 F.3d 641 (4th Cir. 1996); *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.*, 685 F.2d 1149 (9th Cir.. 1982); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146 (8th Cir. 1980), *cert. denied*, 455 U.S. 977 (4th Cir. 1983); *Clover v. Total Sys. Serv., Inc.*, 176 F.3d 1346 (11th Cir. 1999). The objective reasonable standard, by its definition, fails to take into account the subjective beliefs of the person claiming retaliation. *See Pasqua v. Metropolitan Life*

Insurance Co., 101 F.3d 514 (7th Cir. 1996). There are other circuits that simply require the victim to possess a "reasonable belief" that an activity violates Title VII, a lower standard than the "objectively reasonable belief" standard. *See*, e.g., *Moyo v. Gomez*, 40 F.3d 982 (9th Cir. 1997), *cert. denied*, 513 U.S. 1081 (1995); *Pasqua*, 101 F.3d at 514; *Long v. Easterfield College*, 88 F.3d 300 (5th Cir. 1996).

A case out of the Seventh Circuit symbolizes how confusing the "reasonable belief" standard is among members of the judicial bar. In the case of *Pasqua*, the trial judge concluded that an "opposition clause" plaintiff had satisfied the first element of a Title VII retaliation claim by demonstrating a "reasonable belief" that a violation had occurred. In *Pasqua*, the trial judge stated that the

> opposition clause plaintiff met the burden because he 'believed that the rumors and accusations amounted to sexual harassment as to Vukanic. . . . Even if (Pasqua) did not believe that he was the subject of sex discrimination, so long as he believed that the rumors and accusations amounted to sexual harassment as to Vukanic, his complaints to Mulvey (his supervisor) constituted a protected activity.'

Pasqua, 101 F.3d at 518. On review to the Seventh Circuit Court of Appeals, the trial judge in *Pasqua* was ridiculed for his finding that Pasqua had met his burden of establishing protected activity. The trial judge in *Pasqua* had relied upon *Jennings v. Tinley Park Community Consol. Sch. Dist. No. 146*, 796 F.2d 962, 967 (7th Cir. 1986). In reversing the trial judge, the Seventh Circuit Court of Appeals stated: "Ordinarily, we do not second-guess a trial court finding on appeal, but the district court seems to be confused about the precedent upon which it relied." *Pasqua*, 101 F.2d at 518. The judicial confusion in *Pasqua* is typical of the confusion that the Magistrate

Judge demonstrated in the case before this Court and the type of confusion that exists within the circuits, and for this reason. Petitioner urges the Court to exercise its discretion to eradicate the confusion on this issue.

By enacting a federal law (Title VII) to prevent "opposition" retaliation in the work place, Congress has demonstrated its desire to have the retaliation laws under Title VII uniformly applied throughout the United States. However, given the inconsistent interpretations among the circuits concerning the first element as outlined above, the outcome of an "opposition retaliation" case under Title VII is largely contingent upon the geographical location of the Plaintiff and which federal circuit becomes the situs for the litigation. For example, if the Petitioner had been litigating the same retaliation claim in the Fifth Circuit, she would have overwhelmingly met her burden of production under the current precedent existing in the sister circuit. *See Long*, 88 F.3d at 300. The same evidence that would have survived in the Fifth Circuit failed under the Fourth Circuit standards, despite the fact that Petitioner's response to the Motion for Summary Judgment was voluminous and created many important factual disputes on genuine issues of material facts.

The instant case offers this Court an appropriate and timely opportunity to provide guidance with regards to an important question of Title VII jurisprudence which will have national ramifications. With a ruling in this case from the Court, the circuits would uniformly understand what type of belief the alleged victim must possess in order to establish an actionable claim under the "opposition clause" of Title VII, and justice would no longer be dependent upon the geographical location of the Plaintiff's lawsuit. Additionally, a ruling from this Court would eliminate the void in the federal circuits that have

not addressed the "reasonable belief" issue in "opposition-clause" cases. The fact that the United States Magistrate Judge in the case subjudice relied upon, as ratified by the Fourth Circuit Court of Appeals, a non-binding case from the district court in the Southern District of Texas is a testament that there is a lack of judicial precedent in this area of Title VII jurisprudence. See Appendix C, p. 13a.

The holding from the lower court in this case stands for the proposition that a Plaintiff in an "opposition-clause" case under Title VII cannot establish a *prima facie* claim if she learns of the underlying sexual harassment activity from a third party who is not the victim, or if the Plaintiff fails to personally witness all of the alleged underlying sexual harassment activities. Such a holding completely destroys the spirit and letter of the provisions of Title VII which are designed to encourage opposition to sexual harassment and to foster participation in sexual harassment proceedings at the formal or informal level. Therefore, the lower court's holding represents such significant departure from the Congressional intent embodied in Title VII that this Court should exercise its supervisory power which allows it to review lower courts' decisions.

The lower court's decision also holds that "[i]nformal activities outside Title VII's established procedure are not necessarily entitled to federal protection." Appendix C, p. 13a. This proposition of law had already been renounced by the Fourth Circuit in *Laughlin v. Metropolitan Washington Airport Authority*, 149 F.3d 253 (4th Cir. 1998). It is undisputed that the alleged victim to the underlying sexual harassment did not file a formal complaint as she could have under the provisions of Title VII; she did not complain at all because she was too

intimidated by Hilliard. Butler Depo. Ex. 3, p. 2. Title VII does not require the alleged victim to energize the formal reporting apparatus of Title VII in order for an opposition plaintiff to be cloaked with federal protection against retaliation for opposing unlawful conduct. To that end, the Fourth Circuit is in conflict with other circuits and its own precedent which do not impose such a requirement. *See*, e.g., *Reginelli v. Motion Industries, Inc.*, 987 F. Supp. 1137 (E.D. Ark. 1994). Petitioner submits that whether or not an "opposition clause" plaintiff receives protection under Title VII is an important question of federal law, and the conflict in the circuits is a compelling reason to justify granting this petition.

This Court should also grant the petition because the Fourth Circuit Court of Appeals decided Petitioner's Due Process claim in a way that conflicts with relevant decisions of this Court and its own precedent. The trial court, as ratified by this Court of Appeals, liberally construed Petitioner's complaint as stating a cause of action under 45 U.S.C. 1983, alleging a violation of her Fourteenth Amendment to the United States Constitution. App. C, pp. 25a-27a.

Butler was hired by the County on January 18, 1994. Petitioner contended that she was a regular employee with the County of Orangeburg. The County's Ordinance defined a regular employee as one who has satisfactorily completed at least six (6) months of continuous service with the county. App. D, p. 32a. Butler was terminated on September 23, 1994. Her probationary status ended on July 18, 1994. She had clearly met the regulatory definition of "regular status". As a regular employee, Petitioner was given certain regulatory rights under a County Ordinance, rights that included a pro-

gressive disciplinary scheme and a right to file a grievance in response to a termination that she perceived as unjust. App. D, pp. 32a-42a. In a Virginia case involving regulations similar to the case at bar, the Fourth Circuit held that regulation at issue conferred property rights to continued employment on the aggrieved employee. *Detweiler v. Com. of Va. Dept. of Rehab. Servs.*, 705 F.2d 557 (4th Cir. 1983).

In *Perry v. Sinderman*, 408 U.S. 593 (1972), this Court held that proof of a property interest entitles a governmental employee to a hearing "where he could be informed of the grounds for his non-retention and (be given an opportunity) to challenge their sufficiency." 408 U.S. at 603. Moreover, this Court later held that an agency "is required to comply with its regulations that are congruent with the requirements of constitutional due process." *Detweiler*, 705 F.2d at 561 (citing *United States v. Caceres*, 440 U.S. 741, 749 (1979)).

In deviating from its own precedent and controlling authority from this Court, the trial court, with ratification by the Court of Appeals, erroneously concluded that Butler failed to show a property right to continued employment. Appendix C, pp. 25a-27a. The analysis in the lower court is completely flawed. The lower court's order even uses a state common law to deny Butler's Due Process Claim. The summary judgment evidence overwhelmingly establishes that Butler had a property right in continued employment and that she was deprived of all the regulatory requirements for due process that had been promulgated under its personnel regulation. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Butler has been deprived of her constitutional right to be heard by the County, and despite

having responded to the Motion for Summary Judgment in an elaborate fashion, evidently, she was not heard at the Fourth Circuit who simply rubber-stamped the Magistrate Court Judge's order which granted summary judgment. This case is a textbook example of justice denied, and for the compelling reasons stated above, this Court should give Butler a chance to convince it that she deserves a remand for trial by jury.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2286

AVIS W. BUTLER,
Plaintiff-Appellant,

versus

ORANGEBURG COUNTY; DONNIE L. HILLIARD,
in his individual and official capacity,
Defendants-Appellees.

Appeal from the United States District Court
for the District of South Carolina, at Columbia
Charles E. Simons, Jr., Senior District Judge
(CA-97-1412-5-6BC)

Submitted: February 25, 1999 Decided: March 8, 1999

Before HAMILTON, WILLIAMS,* and MICHAEL,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

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* Judge Williams did not participate in consideration of this case. The opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

PER CURIAM:

Avis W. Butler appeals from the magistrate judge's order granting summary judgment to the Defendants on her employment discrimination suit.* Our review of the record and the magistrate judge's opinion discloses no reversible error. Accordingly, we affirm on the magistrate judge's reasoning. *See Butler v. Orangeburg County*, No. CA-97-1412-5-6BC (D.S.C. Aug. 3, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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* The parties consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c) (1994).

APPENDIX B

FILED April 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2286
CA-97-1412-5-6BC

AVIS W. BUTLER
Plaintiff-Appellant

v.

ORANGEBURG COUNTY; DONNIE L. HILLIARD,
in his individual and official capacity,
Defendants-Appellees

ON PETITION FOR REHEARING
AND REHEARING EN BANC

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX C

[Filed Aug. 3, 1998]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 5:97-1412-06BC

AVIS W. BUTLER,

Plaintiff,

vs.

COUNTY OF ORANGEBURG, SOUTH CAROLINA, and DONNIE L. HILLIARD IN HIS INDIVIDUAL and OFFICIAL CAPACITIES,

Defendants.

ORDER

The *pro se* plaintiff, Avis Butler ("Butler") filed her complaint in this court on May 15, 1997. She filed an amended complaint on July 28, 1997 in which she alleges retaliatory discharge in violation of the Civil Rights Act of 1991 ("Title VI"), 42 U.S.C. § 2000e, *et seq.* She also appears to assert claims under 42 U.S.C. §§ 1983 and 1988.[1] The defendants are the County of Orangeburg ("County") and Donnie Hilliard ("Hilliard"), the

[1] The defendants correctly argue that 42 U.S.C. § 1988 is a jurisdictional statute which provides no basis for a cause of action. Butler appears to have abandoned this cause of action, as she does not address it in her memorandum in opposition to summary judgment.

County Administrator. The parties consented on January 7, 1998 to trial before the undersigned magistrate judge. By order of the Honorable Charles E. Simons, Jr., Senior United States District Judge, pursuant to 28 U.S.C. § 636(c) and the consent of the parties, this case was referred to the undersigned magistrate judge for all further proceedings and entry of judgment. On January 12, 1998, the defendants filed a motion for summary judgment with deposition excerpts and affidavits. Because the plaintiff is proceeding *pro se,* she was advised by the court on January 13, 1998, pursuant to *Roseboro v. Garrison,* 528 F.2d 309 (4th Cir. 1975), that a failure to respond to the defendants' motion for summary judgment with additional evidence or counter-affidavits could result in the dismissal of her complaint. On May 22, 1998, Butler filed a memorandum in opposition to the defendants' motion for summary judgment ("Plaintiff's Opposition Memorandum") with exhibits. The defendants filed a reply brief on June 3, 1998.

SUMMARY JUDGMENT STANDARD

When no genuine issue of any material fact exists, summary judgment is appropriate. *Shealy v. Winston,* 929 F.2d 1009, 1011 (4th Cir. 1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Id.* Courts take special care when considering summary judgment in employment discrimination cases because states of mind and motives are often crucial issues. *Ballinger v. North Carolina Agric. Extension Serv.,* 815 F.2d 1001, 1005 (4th Cir.), *cert. denied,* 484 U.S. 897 (1987). This does not mean that summary judgment is never appropriate in these cases. To the contrary, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported

motion for summary judgment; the requirement is that there be no *genuine* issue of *material fact.*" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

In this case, defendant "bears the initial burden of pointing to the absence of a genuine issue of material fact." *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 718 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If defendant carries this burden, "the burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact." *Id.* at 718-19 (citing *Anderson*, 488 U.S. at 248-48).

Moreover, "once the moving party has met his burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial." *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 874-75 (4th Cir. 1992). The non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *Id.* and *Doyle v. Sentry, Inc.*, 877 F. Supp. 1002, 1005 (E.D. Va. 1995). Rather, the non-moving party is required to submit evidence of specific facts by way of affidavits [*see* Fed. R. Civ. P. 56(e)], depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. *Baber*, citing *Celotex Corp., supra.* Moreover, the non-movant's proof must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) and *DeLeon v.*

St. Joseph Hospital Inc., 871 F.2d 1229, 1233 (4th Cir. 1989), n. 7, *cert. denied*, 493 U.S. 825 (1989). Unsupported hearsay evidence is insufficient to overcome a motion for summary judgment. *Martin v. John W. Stone Oil Distrib. Inc.*, 819 F.2d 547 (5th Cir. 1987) and *Evans v. Technologies Applications & Services Co.*, 80 F.3d 954 (4th Cir. 1996).

FACTS

1. During October of 1993, Butler learned that the County had an opening for a Director of Finance. She applied for the position, was interviewed, and credit and background checks were performed. Butler began her employment with Orangeburg County as Director of Finance on approximately January 18, 1994. Hilliard was Butler's direct supervisor.

2. On June 1, 1994, Butler was promoted to the position of Division Director of Administrative Services pursuant to a restructure of the organization. She received a paygrade and salary increase and additional supervisory responsibilities.

3. On July 18, 1994, Hilliard, Assistant Finance Director Janella Shuler ("Shuler"), Donna Livingston ("Livingston"), Desiree Chavis ("Chavis") had a conversation in which they discussed a sexual harassment lawsuit against a South Carolina State University professor. Butler was not present during the conversation.

4. On or around July 19, 1994, Hilliard issued a directive to Butler to demote Livingston, who was under the general supervision of Butler.

5. On or around July 20, 1994, Butler discussed the directive issued by Hilliard with Shuler, who was Livingston's immediate supervisor. The parties disagree as to

what transpired. Butler claims that Shuler complained to her about Hilliard sexually harassing Livingston (during the July 18, 1994 incident) and stated that she was offended by Hilliard's unprofessional behavior. Butler claims that Shuler told her that Hilliard, in demonstrating the professor's actions which give rise to the suit, kissed his finger with his lips and "placed that same finger on Ms. Livingston's lips." Butler Dep. Ex. 2. Shuler states that Hilliard did not touch Livingston and denies that she told Butler that she was offended by Hilliard's actions. Shular Aff.

6. On July 20, 1994, Butler informed Bill Clark ("Clark"), the County's Personnel Director of her conversation with Shuler. Butler did not discuss the July 18, 1994 conversation with any of the other conversation participants (Hilliard, Livingston, Chavis, and Shuler). At that time, Clark agreed to discuss the incident with Hilliard. Butler then informed Shuler that Clark would handle the matter.

7. Butler claims that on July 22, 1994, she was informed by Shuler that Hilliard had demanded to know who had complained to Clark about the incident. Shuler denies this. Shuler Aff.

8. On July 25, 1994, Butler was given her six-month probationary evaluation by Hilliard. Butler Dep. Ex. 5. She was given a memorandum dated July 22, 1994 in which she was informed that her probationary period was going to be extended for an additional ninety days. Butler claims this was in violation of the Orangeburg County Code § 2-233 because a report was not submitted prior to the end of her probationary period on July 18, 1994.[2]

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[2] The Orangeburg County Code provides:

> All new employees appointed to regular county positions shall serve a probationary period of at least six (6) months. . . .

9. On September 23, 1994, Butler's employment with the County was terminated. The reasons for her termination were set forth in a letter. Butler Dep., Ex. 6.

10. Butler filed a charge of discrimination with the South Carolina Human Affairs Commission, who referred the matter to the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a right-to-sue letter.

DISCUSSION

Butler alleges that the defendants violated her rights under Title VII by terminating her in retaliation for reporting the alleged sexual harassment incident. Additionally, she attempts to assert claims under § 1983 for violations of her First and Fourteenth Amendment rights. The defendants argue that they are entitled to summary judgment because: (1) Butler fails to make out a prima facie case of retaliatory discharge; (2) even if Butler could make out her prima facie case, they have offered legitimate, nondiscriminatory reasons for terminating her which she cannot refute; (3) Hilliard cannot be held individually liable for a claim under Title VII; (4) Butler fails to show that the County is liable under § 1983 because she fails to show that the County's customs or policies violated her federal statutory or constitutional rights; and (5) Butler has not properly asserted a claim for a violation of her constitutional rights under § 1983, and she fails to show that her Fourteenth or First Amendment rights have been violated.

Before the completion of the probationary period, the department head shall submit a probationary employee report to the county administrator. The report will indicate whether (a) the employee should be continued as a regular employee; (b) if the employee's probationary period should be extended for three (3) additional months; or (c) that the employee will be discharged. Orangeburg Co., S.C., Code § 2-233(e)(1).

1. *Title VII*

Butler alleges that the defendants illegally terminated her in retaliation for her complaints of sexual harassment of Livingston by Hilliard. Amended Complaint at 4. To prevail on Title VII retaliatory discharge claim, an employee must establish direct evidence [3] of discrimination or a prima facie case, which includes:

(1) evidence that the employee engaged in a protected activity;

(2) evidence that the employer took adverse action against the employee; and

(3) evidence of a causal connection between the protected activity and the adverse action.

See Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989); *McNairn v. Sullivan*, 929 F.2d 974, 977 (4th Cir. 1991); and *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994). As with Title VII discrimination cases, if the employee establishes a prima facie case of retaliatory discharge, the employer is required to come forward with legitimate non-retaliatory reasons for the discharge. The burden of proof then shifts to the employee to prove with "a new level of specificity" that the employer's proffered reasons are pretextual. *Williams*, 871 F.2d at 457; *Harrell v. Hudson*, 30 F.3d 129, (4th Cir. 1994) [Table], *citing Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The employee has the burden throughout to show that "but for" engaging in the protected activity, she would not have been terminated. *Ross*, 759 F.2d at 365-66 and *Williams*, 871 F.2d at 459.

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[3] Butler has not presented any direct evidence of discrimination.

a. *Prima Facie Case*

The defendants concede that Butler can meet the second prong of her prima facie case, that she was subjected to an adverse employment action, but they argue that she fails to meet the first prong (engaged in activity protected by Title VII) and a third prong (causal connection between protected activity and her termination).

Butler argues that she engaged in a protected activity because she had a good faith, reasonable belief that a violation existed. An employee's underlying discrimination does not have to be meritorious in order to invoke the protection of Title VII's retaliation provision. *See Ross*, 759 F.2d at 357 n.1. An employee does, however, need to have an "objectively reasonable belief" that he was the victim of discrimination made unlawful under Title VII. *See, e.g., Mayo v. Kiwest*, 94 F.3d 641, 1996 WL 460769 (4th Cir. 1996) [Table]; *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.*, 685 F.2d 1149, 1156-57 (9th Cir. 1982); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir. 1980), *cert. denied*, 455 U.S. 977 (1983); *Kralawec v. Prince George's County*, 503 F. Supp. 985, 1008 (D.Md. 1980), *aff'd*, 679 F.2d 883 (4th Cir), *cert. denied*, 459 U.S. 872 (1982).

Butler fails to show that she engaged in a protected activity because she fails to show that she had an objectively reasonable belief that the activity was unlawful under Title VII. Butler was not present during the alleged sexual harassment and only heard about the incident second-hand through Shuler. She knew that the parties were discussing a sexual harassment lawsuit. Livingston states that Hilliard merely showed her what the South Carolina State professor accused of sexual harassment had done. She states that Hilliard touched his fingers to his lips, but merely held his finger in the air and did not

touch her. Livingston states that she did not find Hilliard's actions threatening or harassing and that she never felt harassed by Hilliard. Livingston Aff. Shuler states that Hilliard did not touch anyone and that she never told Butler that she considered Hilliard's actions to be harassment. Specifically Shuler states that she considered the event to be a non-issue." Shular Aff. This activity "is not the basis upon which a reasonable person . . . would voice a complaint of unlawful employment practices." *Harvey v. Chevron USA, Inc.*, 961 F. Supp. 1017, 1032 (S.D.Tex. 1997). Butler admits that she did not talk to any of the participants to the alleged sexual harassing conversation other than Shuler (specifically she did not speak to Livingston who was the alleged victim). A plaintiff may not base her claim of objective reasonableness on nothing more than office gossip and her own speculation. Informal activites outside Title VII's established procedure are not necessarily entitled to federal protection. "[W]here accusations are made outside the procedures set forth by Congress that accusation is made at the accuser's peril." *E.E.O.C. v. C & D Sportswear Corp.*, 398 F. Supp. 300, 306 (M.D.Ga. 1975). While employees should be encouraged to work out problems without resorting to federal process, careless and uncounseled accusations of discrimination are not necessarily protected by Title VII's opposition clause.

Since Butler did not engage in protected activity prior to her termination, it follows that a causal connection cannot be proven. Even if Butler's actions can be said to constitute "protected activity," a causal connection between the protected activity and the adverse employment action has not been demonstrated. A causal relationship requires more than simple coincidence. Causation requires the employer's action be the consequence of the protected activities and of nothing else. "[T]he mere

existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936, 943 (4th Cir. 1992), quoting *Anderson*, 477 U.S. at 252.

b. *Legitimate Nondiscriminatory Reasons*

Even if Butler could establish a prima facie case of retaliatory discharge, the defendants have articulated numerous legitimate, nondiscriminatory reasons for terminating her. The defendants outlined these reasons in Butler's termination letter. These reasons, and Butler's arguments as to why these reasons are pretextual, are discussed below.

(1) *Failure to Timely Prepare Budget Book*

First, Butler failed to timely prepare a budget summary. Although the fiscal year began on July 1, the summary had not been prepared as of the time of Butler's termination. Butler admits that the documents necessary to produce the summary were available to her by June 30, 1994. Butler Dep. 136-138. Butler argues that her problem preparing the book resulted from problems encountered with the data processing employees. Butler, however, supervised the data processing section. Hilliard Dep. Ex. 4.

(2) *Preparation of Audit Request for Proposal*

Butler was instructed to prepare a Request for Proposal ("RFP") to solicit quotes from certified public accountants for an audit of Orangeburg County. The audit must occur within thirty days of the beginning of the fiscal year (July 1). S.C. Code Ann. § 4-9-150. A draft copy of the RFP was available in June of 1994, but it was delayed because of legislation pending in the South Caro-

lina Legislature. Although Butler was told to monitor the progress of the legislation and it was passed on August 30, 1994, the RFP was not available until the day of her termination. Butler argues that she should not be held responsible for delays by the South Carolina Legislature or her employee (purchasing agent in charge of preparing the RFP).

(3) *Delay in Processing Accounts Payable*

Butler acknowledges that there were a number of invoices that were not being paid in a timely fashion. Butler Dep. 159. She stated that the problem was "worse than bad" and that some bills had gone to collection litigation. Butler Dep. 159, 268. She admitted that it was her ultimate responsibility to make sure the bills were paid on time (Butler Dep. 161), yet she sent vendors who complained about slow payments directly to Hilliard rather than dealing with these vendors herself. Butler Dep. 163-164. Hilliard Dep. 18. At one point, the County had five different boxes of bills that were waiting to be paid. Butler Dep. 163. Butler requested that the Orangeburg Sheriff send a memo to Hilliard regarding slow payment of bills for the Sheriff's Department. Butler Dep. 252-53, Ex. 15. Butler claims she should not be held responsible for this problem because one of her employees was out sick, a mail courier was injured and her staff had to perform his job, and her department contained may newly hired individuals.

(4) *Storage Lien*

The local newspaper, the *Orangeburg Times and Democrat*, ran a legal notice in August of 1994 showing that a storage unit personally leased by Butler was the subject of a lien sale. Butler Dep., Ex. 9. Butler admits that this occurred every three or four months. Butler Dep.

178-79, 188. She did not fully pay her debt and allowed her name to run in the newspaper despite acknowledging that the County has an ordinance which requires employees to keep their financial affairs arranged so the County is not embarrassed by excessive personal indebtedness. Butler Dep. 181-188. Butler claims that this was not a problem because no one at the County complained to her about the issue. She also claims that it is disparate treatment that she was fired for this, but Chavis (who filed for bankruptcy) and Shuler (who had a lien against her) were not.

(5) *Unauthorized Use of Telephone*

Butler's personal calls for July, August, and September of 1994 totaled $129.02 for which she never reimbursed Orangeburg County. She states that part of the reason she did not pay these bills was because Orangeburg County was paying the phone bill, along with its other bills, late. Butler Dep. 192-194. She also claims disparate treatment on this issue because Hilliard did not have to reimburse his mobile phone bills to his home while he was on travel. Hilliard Dep. 114-115, and because Livingston stated that she was not required to pay for phone calls home.

(6) *Failure to Reimburse Petty Cash*

Butler is charged, by Orangeburg County ordinance, with adopting and enforcing regulations for the disbursement and reimbursement to the petty cash fund. Sometime prior to June 15, 1994, Butler borrowed approximately twelve dollars from the petty cash fund to buy film, of which approximately six dollars she did not have receipts to verify purchases. The money was not reimbursed until sometime in September of 1994. Butler Dep.

207-208. Butler acknowledges that this money was not returned in a timely manner, basically because she forgot to return it. Butler Dep. 209, 213. She also argues disparate treatment because Livingston mishandled some funds and was given thirty days to pay back the monies owed.

(7) *Reimbursement from Travel Advance*

Butler received a travel advance the first week of August 1994. Butler Dep. 214. She acknowledges that under Orangeburg County ordinance, such reimbursements must be made within five days following the trip. Butler Dep. 213-214. Butler, however, did not make this reimbursement until the week of September 9, 1994. Butler Dep. 217. She blames the delay on her own vacation, a change that had to be made to the form, and having to leave early to take care of a sick family member. She also argues that other employees were late returning the remainder of their advances but were not fired.

(8) *Failure to Notify Immediate Supervisor of Change of Address and Telephone Number*

Butler admits that she established a new residence in Sumter on August 11, 1994, but did not inform Hilliard until September 22, 1994. Butler Dep. 218-219. The defendants argue that Hilliard needed to know her residence and telephone number because Butler did not work regular hours. *See* Butler Dep. 132-133; Shuler Aff. Butler claims that this was not a problem because she did not truly leave Orangeburg until after she was terminated. She admits, however, that she rotated between her apartments in Orangeburg and Sumter and her parents' house in Orangeburg. Butler Dep. 221.

(9) *Failure to Follow Specific Instructions Regarding Grant Fund*

Finally, the County argues that Butler failed to follow instructions concerning a grant fund administered by the County. A problem with an overpayment was discovered and Butler was instructed to send a letter to the organization's executive director concerning negotiations for the repayment of certain funds. Butler claims this letter contained false information and was a scheme to defraud the government. She fails, however, to present any information to support this theory.

c. *Pretext*

Butler's arguments that the proffered reasons for her termination were pretextual can basically be broken down into four categories as discussed below.

(1) *Failure to Counsel*

First, Butler argues that the defendants failed to give her warning of her deficiencies before they terminated her. She, however, fails to show that she was anything other than an at-will employee (this issue is discussed further in reference to her § 1983 claims) or that there are any provisions in the Orangeburg County Code, or otherwise, that require such counseling before terminating an employee. Further, as discussed above, Butler was aware of her conduct and deficiencies.

(2) *Disparate Discipline*

Butler next argues that the defendants' reasons were pretextural as to the storage lien, unauthorized use of telephone, failure to timely reimburse petty cash, and failure to timely reimburse travel funds because other employees also engaged in this type of misconduct but were

not disciplined as severely as she was disciplined. First, as to travel vouchers, Butler simply fails to give any specific example. As to the other reasons, Butler fails to show that "any other employee had nearly the same problems as she did across the board." *Karpel v. Inova Health System Services*, 134 F.3d 1222, 1228 (4th Cir. 1998); *see also Houck v. Virginia Polytechnic Institute and State University*, 10 F.3d 204, 206-207 (4th Cir. 1993) ("[i]solated incidents or random comparisons demonstrating disparities in treatment may be insufficient to draw a prima facie inference of discrimination without additional evidence that the alleged phenomenon of inequality also exists with respect to the entire relevant group of employees."). She further fails to show that Hilliard supervised these individuals or that he knew of their wrongdoing.

(3) *Proximity*

Butler also argues that, because her termination occurred close in time to her reporting of the alleged sexual harassment, the proffered reasons for her termination were pretextual. "Plainly, mere knowledge on the part of an employer that an employee it is about to fire has filed a discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharging that employee." *Williams*, 871 F.2d at 457. Butler fails to show anything other than that some of these incidents occurred after she reported the alleged harassment. Further, issues concerning the Budget Book, delays in processing accounts, and the failure to reimburse petty cash all began with incidents predating the report of the alleged sexual harassment.

(4) *Fairness*

Finally, Butler argues that it is not fair to hold her accountable for the errors in judgment, mistakes, and poor performance of others. Numerous times Butler argues that the defendants' actions were unfair and "a travesty of justice." What she fails to note, however, is that those who she claims were responsible were employees under her own supervision. If anything, Butler's protests that it was her employees who failed to perform adequately reflects on her own management problems.

Even if Butler could refute one or some of the defendants' legitimate, nondiscriminatory reasons for terminating her, she fails to refute all of the reasons. An employee must offer evidence of pretext as to each of the reasons. "If at least one reason remains unquestioned which, standing alone, would have caused [the employer] to take the challenged action, then summary judgment [is] proper. *Sample v. Aldi, Inc.*, 61 F.3d 544, 549 (7th Cir. 1995); *see also Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 202 (4th Cir. 1997) (employer entitled to summary judgment where employee offered evidence of pretext as to one, but not both of the reasons articulated for the challenged action). Further, Butler simply fails to show that "but for" the defendants' discriminatory acts she would not have been terminated.

Additionally, no other complainers were dismissed. Although Butler claims that Shuler complained to her about Hilliard's actions and Butler claims that Hilliard and Shuler had conversations concerning the reporting of his actions, Shuler was not dismissed. *See, e.g., Gleason v. Mesirow Financial, Inc.*, 1995 WL 561039, *5 (N.D. Ill. September 18, 1995) (unpublished), *aff'd*, 118 F.3d 1134 (7th Cir. 1997). Butler fails to establish a prima

facie case of retaliatory discharge because she fails to show that she engaged in a protected activity and that there was a causal connection between the protected activity and the adverse employment action. Butler thus fails to show that she was subjected to retaliatory termination in violation of Title VII.

2. *Individual Liability Under Title VII*

Hilliard argues that he cannot be subjected to individual liability as to Butler's Title VII claim because his action involved a plainly delegable duty. Title VII establishes civil liability for discrimination by employers with fifteen or more employees. 42 U.S.C. § 2000e(b). An employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . ., [and] any agent of such a person. . . ." 42 U.S.C. § 2000e(b). Two Fourth Circuit decisions are instructive on the question of supervisor liability: *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), vacated on other grounds, 900 F.2d 27 (4th Cir. 1990), and *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir.), *cert. denied*, 513 U.S. 1058 (1994). Finding that genuine issues of material fact precluded summary judgment on the question of whether Paroline could pursue her Title VII claims against her supervisor, the Fourth Circuit stated: "An individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." *Paroline*, 879 F.2d at 104. In *Birkbeck* the Fourth Circuit relied on Title VII cases from other Circuits in its holding that the Vice-President of the plaintiff employees corporation could not be held individually liable under the Age Discrimination in Employment Act ("ADEA"). It stated:

> The purpose of this provision [29 U.S.C. § 630(b)] can only be to reduce the burden of the ADEA on

> small businesses. Given the evident limitation, it would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does apply with full force a person who supervises the same number of workers in a company employing twenty or more. Such personal liability would place a heavy burden on those who routinely make personnel decision for enterprises employing twenty or more persons, and we do not read the statute as imposing it. Instead, we read § 630(b) as an unremarkable expression of respondeat superior—that discriminatory personnel actions taken by an employer's agent may create liability for the employer. . . . We therefore hold that the ADEA limits civil liability to the employer and that Fennessey, as a Marvel employee is not a proper defendant in this case.

Birkbeck, 30 F.3d at 510-511 (citations omitted). Further, the court expressly distinguished *Paroline*, stating "[a]n employee, however, may not be shielded as an employer's agent in all circumstances. We address here only personnel decisions of a plainly delegable character." *Id.* at 511 n. 1 (citing *Paroline*, 879 F.2d at 104).

Although the district courts of the Fourth Circuit are split on whether individual liability suits may be maintained under Title VII, *see, e.g., Turner v. Randolph County, N.C.*, 912 F. Supp. 182, 185-86 (M.D.N.C.) 1995) (nothing that the weight of recent authority supports defining employer in a manner in which individual defendants are not held liable in their individual capacities, but applying *Paroline* to hold that individual defendants could be held liable individually and personally for Title VII violations); *Bryant v. Locklear*, 947 F. Supp. 915, 919 (E.D.N.C. 1996) (dismissing the plaintiff's Title VII claims against her supervisors in their individual

capacities because the challenged personnel decision was delegable in nature), it appears to the undersigned that *Birkbeck* is properly read as limiting *Paroline*, and thus an individual capacity suit may be maintained under Title VII where the personnel decisions at issue are of a plainly delegable nature. *See also Reinhold v. Commonwealth of Virginia*, 135 F.3d 920, 934 n. 4 (4th Cir. 1998). Further, other circuits have held that individual capacity suits cannot be maintained under Title VII. *See, e.g., Smith v. Lomax*, 45 F.3d 402, 403 n. 4 (11th Cir. 1995); *Lankford v. City of Hobart*, 27 F.3d 477, 480 (10th Cir. 1994); *Grant v. Lone Star*, 21 F.3d 649, 651-53 (5th Cir.) (Title VII), *cert. denied*, 513 U.S. 1015 (1994), and *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (("If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees."). Here, Butler has failed to show that any of the personnel decisions were not delegable in nature and thus Hilliard cannot be held personally liable for Title VII violations. Additionally, Butler concedes that Hilliard cannot be subjected to individual liability under Title VII. *See* Plaintiff's Opposition Memorandum, at 30.

3. *§ 1983*

The defendants argue that Butler fails to state a claim under § 1983 because she only asserts claims based on rights granted by Title VII. In her opposition memorandum, Butler argues that her due process rights under the Fourteenth Amendment and her free speech rights under the First Amendment were violated. The amended complaint only contains the following cause of action:

> (Violation of Title VII)—Retaliation 21. By the acts and practices alleged above, Defendants illegally ter-

> minated Plaintiff in retaliation for her complaint of sexual harassment of another employee ,in violation of Title VII.

Complaint, at 4. She does, however, refer to the Fourteenth Amendment and § 1983 in the first paragraph of her amended complaint. Further, in her motion to amend her complaint she refers to the Fourteenth Amendment. Viewed in the light most favorable and allowing liberal construction of this *pro se* plaintiff's complaint, Butler has alleged a cause of action under the Fourteenth Amendment. Butler, however, fails to allege a claim under the First Amendment.[4] Even if these claims are properly asserted, Butler fails to show that these rights were violated, as discussed below.

a. *Liability of Orangeburg County under § 1983*

Butler fails to show that Orangeburg County is liable under § 1983 because she fails to show that the County's customs or policies violated her federal statutory or con-

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[4] In her July 7, 1997 Motion to Amend Complaint, Butler moves to include the following paragraph:

> 1. Plaintiff's civil and constitutional rights were violated when Defendant Hilliard, acting under pretense and color of state law, statutes and authority, willfully, knowingly and with specific intent deprived the Plaintiff of her constitutional rights, privileges and immunities secured by the Constitution and laws of the United States. Defendant Hilliard retaliated against the Plaintiff by placing her on probation and subsequently terminating her for having complained about his sexual harassment of an employee. The Defendant violated clearly established laws secured by the Fourteenth Amendment of the Constitution and laws of the United States, particularly Title 42 US Code §§ 2000e *et seq.*, as amended.

Plaintiff's Motion to Amend Complaint. Assuming that this paragraph had been incorporated into Butler's amended complaint, she still fails to allege a First Amendment claim.

stitutional rights. *Greensboro Professional Fire Fighters Ass'n Local 3157 v. City of Greensboro*, 64 F.3d 962, 964-66 (4th Cir. 1995). Generally a single incident, such as Hilliard's actions in terminating Butler, does not implicate a custom or policy for purposes of § 1983. *See Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994). Since Orangeburg County does not have "final policymaking authority" (it rests with the Orangeburg County Council instead), Butler fails to show that the County is liable under § 1983. Butler concedes that Hilliard lacked policymaking authority, *see* Plaintiff's Opposition Memorandum at 29, but she alleges that the County ratified Hilliard's acts by upholding her termination. Butler did not request a grievance hearing by letter until October 7, 1994, which was more than four days after the ten day deadline established under the Orangeburg Code. Orangeburg Co., S.C., Code § 2-248(d)(3)(a). Thus, Orangeburg County could not have ratified Hilliard's actions because Butler failed to timely request a grievance hearing.

b. *Fourteenth Amendment*

Butler alleges that the defendants violated her Fourteenth Amendment rights because she had a property interest in continued employment which entitled her to a termination hearing. She claims that she has a property interest based on Orangeburg County's personnel regulations promulgated in Orangeburg County Ordinance Number 82-10-15 Division 8 (Personnel Policy) which contains a four-step progressive disciplinary process.

Under South Carolina law, an at-will employee may be terminated for any reason or for no reason at all. *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985). Employment-at-will status can be altered by promises made to an employee in policies, employee handbooks, and employee bulletins. *Small v. Springs Indus-*

tries, 357 S.E.2d 452 (S.C. 1987). Butler has not pointed to any language in the Orangeburg County Code which limits the at-will status of County Employees. *See Epps v. Claredon County*, 405 S.E.2d 386, 386-87 (S.C. 1991); *see also Taylor v. Cumming Atlantic, Inc.*, 852 F. Supp. 1279 (D.S.C. 1994), *aff'd*, 48 F.3d 1217 (4th Cir. 1995), *cert. denied*, 516 U.S. 864 (1995) (commission agreement did not change at-will employment status where documents relied on did not contain language which could be read to alter the plaintiff's at-will employment status.); *Montgomery v. USAir, Inc.*, 1995 WL 420715 (D.S.C. 1995) (employer's personnel policy guide containing company rules of conduct and guidelines for exercise of management discretion in personnel matters and stating that employees are to read and be familiar with the procedures which the employer intends to apply fairly to all did not create a contract altering employee's at-will status where guide did not contain any procedure detailing how terminations would take place and provided that the guide's provisions could be changed unilaterally by the employer). The County Code specifically provides that "all employees of the County are employees-at-will." Orangeburg Co., S.C., Code § 2-226. Further, the Code specifically states that it is a "guideline" and identifies types of disciplinary actions "which may be taken."

Butler also argues that there is an exception to her at-will status because her discharge violates a clear mandate of public policy. "Where the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises." *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E. 2d 213, 216 (S.C. 1985). In *Ludwick*, the employee was discharged from her employment because she chose to testify before the South Carolina Employment Security Commission (and avoid criminal penalties

for failing to testify) pursuant to a subpoena. *Id.* at 214, 216. "*Ludwick* 'extends to violations of a clear mandate of public policy.'" *Culler v. Blue Ridge Electric Cooperative*, 422 S.E.2d 91, 92 (S.C. 1992).

The Fourth Circuit stated that the *Ludwick* exception is to be narrowly applied. *Merck v. Advanced Drainage Systems*, 921 F.2d 549, 554 (4th Cir. 1990). In *Epps v. Clarendon County*, 405 S.E.2d 386 (S.C. 1991), the Supreme Court of South Carolina declined to extend the public policy exception of *Ludwick* where an employee already had "an existing remedy for a discharge [Epp's claim that he had been terminated in violation of his constitutional right to free speech and association was actionable under 42 U.S.C. § 1983] which allegedly violates rights other than the right of employment itself." *Id.* at 387, *see also Dockins v. Ingles Markets, Inc.*, 413 S.E.2d 18, 19 (S.C. 1992) (when a statute creates a substantive right and provides a remedy for an infringement of that right, the employee is limited to the statutory remedy). Since Butler could (and did) avail herself of remedies offered under Title VII, she is not entitled to relief under the public policy exception to her employment-at-will status. Butler fails to show that the defendants violated her Fourteenth Amendment rights.

c. *First Amendment*

Even if Butler properly asserted a First Amendment claim, she fails to show that the defendants violated her rights. She claims that the defendants violated her right of freedom of speech because the defendants placed her on probation and subsequently terminated her because she spoke out about Hilliard's alleged harassment of Livingston.

The Supreme Court has repeatedly held that public employees cannot be fired in retaliation for exercising their

rights under the First Amendment. *See, e.g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). A three-part inquiry is used to determine whether the First Amendment shields a public employee from discharge for protected speech. (Since each part affords a possible independent basis for judgment, the order of inquiry may vary with the circumstances of the case.) The first step is to ask whether the speech was about a matter of legitimate public concern. This question is one of law, not of fact. *Jones v. Dodson*, 727 F.2d 1329, 1334 (4th Cir. 1984). If the speech was about a matter of public concern, the question becomes whether the employee would have been discharged "but for" the speech. The defendant-employer will not be liable if the discharge would have occurred for other reasons, such as the plaintiff's own incompetence. This classic motivational question is one of fact. The employee bears the burden of demonstrating that protected speech was a motivating factor in the discharge. The burden then shifts to the employer to show that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy v. Doyle*, 429 U.S. at 287. If protected speech was the "but for" cause of the discharge, courts must still inquire whether the degree of public interest in the employee's statement was nonetheless outweighed by the employer's responsibility to manage its internal affairs and provide "effective and efficient" service to the public. If so, then the employer will not be liable. This question is ultimately one of law. *Connick v. Myers*, 461 U.S. 138, 150-54 (1983). The defendants have offered numerous reasons unrelated to the incident (as discussed above) for its acts. Butler fails to show that "but for" her protected speech she would not have been terminated. Butler fails to show that the defendants violated her First Amendment rights.

CONCLUSION

For the foregoing reasons ,it is, therefore,

ORDERED that the defendants' motion for summary judgment is granted.

/s/ Joseph R. McCrorey
JOSEPH R. MCCROREY
United States Magistrate Judge

August 3, 1998
Columbia, South Carolina

NOTICE OF RIGHT TO APPEAL

Plaintiff has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

APPENDIX D

CONSTITUTIONAL PROVISION, STATUTE AND ORDINANCE

UNITED STATES CONSTITUTION

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED
42 U.S.C. § 2000e-3

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because

he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, *testified,* assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

ORDINANCE NO. 82-10-15

DIVISION 8. PERSONNEL POLICY
DEFINITIONS

* * * *

Employee (regular, full time): An employee who has completed six (6) months of satisfactory service, works no less than the established official work week, and is not a temporary or student employee.

* à * *

Probationary period: A working test period required of an employee following his appointment to a position, normally not to exceed six (6) months in duration.

Promotion: The movement of an employee from a position in one classification to a different position in another classification having a greater degree of responsibility and a higher salary range.

* * * *

(e) *Probationary period.*

(1) All new employees appointed to regular county positions shall serve a probationary period of at least six (6) months. Law enforcement officers shall be on a probationary status until they comply with the existing state laws pertaining to law enforcement officers. Before the completion of the probationary period, the department head shall submit a probationary employee report to

the county administrator. The report will indicate whether (a) the employee should be continued as a regular employee; (b) if the employee's probationary period should be extended for three (3) additional months; or (c) that the employee be discharged. Accordingly, an employee may be dismissed during the probationary period at any time at the discretion of the department head for any reason without recourse of appeal.

(2) If an employee is required to be away from work due to illness, workmen's compensation covered injury, bonafide emergency or other authorized leave without pay in excess of ten (10) working days during his/her probationary period, the period of such absence shall not be counted as time in service toward completion of the probationary period.

(f) *Regular status.* Employees who have satisfactorily completed at least six (6) months of continuous service with the county shall be granted regular status. Regular full-time employees are eligible for all benefits and privileges provided by the county for its employees.

* * * *

Sec. 2-247. Disciplinary action.

(a) *Purpose.* The guidelines set out in this section are provided so that should it become necessary for an elected or appointed department head to take disciplinary action against an employee, such discipline will be administered in a fair and equitable manner in all departments, without regard to race, religion, age, sex, handicap or national origin.

(b) *General.*

(1) Disciplinary actions may be prescribed by a department head when, in his/her opinion, an employee's work performance or actions are sufficiently below standards so as to be detrimental to the county and/or the employee or if the employee violates county policies and/or ordinances which allow disciplinary action.

(2) Four (4) types of disciplinary actions which may be taken in regard to regular employees are as follows; other disciplinary actions may be appropriate in other circumstances;

a. *Oral warning.* For single, unrelated and relatively minor instances of substandard performances or conduct, an oral discussion between the employee's department head and the employee may be sufficient to correct the situation. In such cases, the department head need not fill out any formal written notice, and there need not be any documentation placed in the employee's personnel folder, however, the department head shall make an informal note for his/her own records in case the corrective action sought is not forthcoming.

b. *Written warning.* This action should take the form of a written notice of reprimand written by the employee's department head and given to the employee. Normally, it would follow repeated instances of minor infractions or substandard performance for which there have been previous oral warnings. This notice shall state clearly the

reasons for the reprimand and provide for the employee's signature acknowledging receipt thereof. A copy of this notice shall be retained by the department head with an additional copy sent to the personnel department to be filed in the employee's personnel folder.

c. *Suspension.* This action shall be taken as a disciplinary measure only when the action and/or behavior of an employee is grave enough to warrant more than a written reprimand but less than discharge. It shall clearly state the reasons, duration, and actions to be taken (discharge) if the action and/or behavior or similar actions/behavior are repeated. As with the written reprimand, this notice shall provide for the employee's signature acknowledging receipt thereof. The original shall be given to the employee, a department copy retained, and a copy forwarded to the personnel department along with a properly executed personnel action form for processing.

d. *Discharge.* If the employee's action, in the judgment of the employee's department head, warrants, the employee may be discharged. Written notice shall be given to the employee giving the reasons and effective date of discharge subject to the provisions for involuntary termination. This notice shall also provide for the employee's signature acknowledging receipt thereof. In cases where notification must be mailed, it shall be sent by certified mail and the signed

return receipt retained. The original shall be given (or mailed) to the employee, a department copy retained, and a copy forwarded to the personnel department along with a properly executed personnel action form for processing.

(3) Any regular employee may seek an appeal of any perceived unjust disciplinary action taken against him/her through the grievance procedures established herein.

(c) *Rules of conduct.* Employees are expected to observe established rules of work and conduct. Accordingly, violations thereof are subject to certain disciplinary actions such as warnings, suspension, and/or dismissal. (Ord. No. 78-8-12, Pt. V, 8-28-78; Ord. No. 83-10-20, § XXXII, 10-3-83; Ord. No. 84-12-18, § IV, 12-12-84; Ord. No. 85-6-12, § XI, 6-17-85; Ord. No. 87-11-21, § 7, 11-2-87)

Sec. 2-248. Grievance procedure.

(a) *Application and purpose.* This action is applicable to all regular employees except a deputy sheriff and a discharged regular employee of an elected official or an official appointed by an authority outside of county government. The purpose of this section is to provide a means whereby any regular employee, except as excluded above, who feels that he or she has been subjected to unfair, discriminatory, or abusive treatment may secure a hearing without delay and be assured of a prompt, orderly, and fair response to the grievance or appeal.

(b) *Statement of policy.*

(1) It is the policy of the county that all employees shall be treated fairly and consistently in all

matters related to their employment. When an employee feels that he/she has not been so treated, he/she may present a grievance or appeal free from interference, restraint, coercion, discrimination or reprisal.

(2) The employee shall be entitled to such time off from his/her regular duties as may be necessary and reasonable for the presentation and processing of his/her grievance or appeal without loss of pay, vacation, or other credits.

(3) The employee shall have ten (10) calendar days from the date of occurrence of the alleged grievance to present in accordance with established procedural guidelines.

(c) *General*

(1) Grievances may include, but are not necessarily limited to, dismissal, suspension, involuntary transfer, promotion. State law provides that compensation shall not be deemed a proper subject for consideration under the grievance procedure except as it may apply to alleged inequities within a department.

(2) The formal grievance procedure contained in this section shall apply only to regular employees who have completed at least six (6) months of satisfactory employment with the county. Probationary, seasonal and temporary employees are not covered by this section.

(d) *Procedures*

(1) A grievance is a complaint or a dispute concerning the interpretation and application of the provisions of the personnel policies and pro-

cedures or of established departmental work rules.

(2) The most effective accomplishment of the work of the county requires prompt consideration and equitable adjustment of the employee grievances. It is the desire of the county to adjust the causes of grievances informally, and both supervisors and employees are expected to make every effort to resolve problems as they arise.

(3) The following procedural steps will be followed in the application of this policy:

a. *Step 1.* An aggrieved employee may personally present his/her grievance to his/her department head within ten (10) calendar days of its occurrence or of the employee's knowledge of its occurrence. The department head shall consider the grievance, attempt to adjust the matter, and shall render a decision in writing to the employee within three (3) working days after receiving the request. In cases where the decision of the department head must be mailed to an aggrieved employee, the decision shall be sent by certified mail with return receipt requested.

b. *Step 2.* This step is exclusively for those county employees assigned to county entities under the policymaking jurisdiction of a board or commission, e.g., county library and Orangeburg Area Development Center. All other county employees shall go directly to Step 3. If the grievance has not been settled, it shall be presented in writing by the employee to the applicable board or

commission within three (3) working days after receipt of the department head's decision. The board or commission will attempt to adjust the matter and shall render a decision in writing to the employee within five (5) working days after receiving the complaint. A copy of the decision will also be sent to the employee's department head and the personnel department.

c. *Step 3*. If the grievance has not been settled, it shall be presented in writing by the employee to the county administrator within three (3) working days after receipt of the department head's (board or commission, where applicable) decision. Upon receipt of the employee's complaint, the county administrator shall obtain a copy of the applicable decision and all other pertinent information and upon receipt of same, shall hold whatever discussion or make such investigations he/she deems desirable or that the employee, board, commission or department head may request. The county administrator shall render a decision in writing to the employee within five (5) working days after receiving the complaint. In cases where the decision of the county administrator must be mailed to an aggrieved employee, the decision shall be sent by certified mail with return receipt requested.

d. *Step 4*. If the grievance has not been settled, the aggrieved employee may request in writing a hearing before the grievance committee. This request shall be directed to the clerk to council within three (3) working

days after receiving the decision of the county administrator. Within three (3) days of receipt of the employee's written request, the clerk to council shall schedule the requested hearing and notify the grievance committee and the employee requesting the hearing of the date of the hearing which shall be no more than fifteen (15) days after receipt of the written request.

e. *Step 5.* This step is applicable to those regular county employees in departments under the direction of appointed department heads in which the employment and discharge authority is vested in the county council. Persons employed in departments under the direction of an elected official or an official appointed by an authority outside of connty government shall be covered by step 6. The grievance committee shall, within twenty (20) days after hearing an appeal, make its findings and decision and report such findings and decision to the county council. If the county council approves, the decision of the grievance committee shall be final, and copies of the decision shall be transmitted by the committee to the employee, department head involved, county administrator and the personnel department. If, however, the county council rejects the decision of the grievance committee, it shall make its own decision without further hearing and that decision shall be final, with copies transmitted to the grievance committee, the employee, the department head involved, the county administrator and the

personnel department. In cases where the decision of county council must be mailed to an aggrieved employee, the decision shall be sent by certified mail with return receipt requested.

f. *Step 6.* Where applicable, the grievance committee shall, within twenty (20) days after hearing an appeal, make its findings and decision and report the findings and decision to the elected or outside appointed department head within whose department the grievance originated. If the applicable elected or outside appointed department head approves, the decision of the grievance committee shall be final and copies of the decision shall be transmitted by the committee to the employee, the county administrator and the personnel department. If, however, the applicable elected or outside appointed department head rejects the decision of the committee, he/she shall make his/her own decision without further hearing, and that decision shall be final, with copies transmitted to the grievance committee, the employee, the county administrator and the personnel department.

(e) *Grievance committee.*

(1) The county council shall appoint a committee composed of not less than three (3) nor more than five (5) members with two (2) alternates to serve for terms of three (3) years, except that the members appointed initially shall be appointed, so that terms will be staggered and one-third of the terms shall expire each year.

Any interim appointment to fill a vacancy for any cause prior to the completion of his term shall be for the unexpired term. Any member may be reappointed for succeeding terms at the discretion of the county council. All members of the grievance committee shall be selected on a broadly representative basis from among the career service or appointed personnel of the several county departments, with the provision that, whenever a grievance comes before the committee initiated by or involving an employee of a department of which a committee member also is an employee such member shall be disqualified from participating in the hearing.

(2) The committee shall select its own chairman from among its members. The chairman shall serve as the presiding officer at all hearings which he/she attends, but may designate some other member to serve as presiding office in his/her absence.

(3) A quorum shall consist of at least two-thirds of the committee members, and no hearings may be held without a quorum.

(4) The presiding officer will have control of the proceedings. He/she shall take whatever action is necessary to ensure an equitable, orderly, and expeditions hearing Parties shall abide by his/her decisions, except when a committee member objects to a decision to accept evidence, in which case the majority vote of the committee will govern.

(5) The committee shall have the authority to call for files, records and papers pertinent to any investigation; to determine the order of the tes-

timony and the appearance of witnesses; to call additional witnesses; and to secure the services of a court reporter to record the proceedings as the situation or committee may dictate.

(6) Even though the proceedings may take the form of an adversarial hearing, i.e., where the parties involved may call for and/or cross-examine witnesses, none of the parties will be allowed to be represented by a lawyer.

(Ord. No. 78-8-12, Pt. VI, 8-28-78; Ord. No. 83-10-20, § XXXIII-XXXVI, 10-3-83; Ord. No. 87-11-21, § 8, 11-2-87; Ord. No. 89-1-1.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Civil Action No.: 5:97-1412-06BC

AVIS W. BUTLER,

Plaintiff,

v.

COUNTY OF ORANGEBURG, SOUTH CAROLINA, and DONNIE L. HILLIARD in his individual and official capacities,

Defendants.

PLAINTIFF'S RESPONSES TO DEFENDANTS' INTERROGATORIES

* * * *

My response to each allegation is:

1) *Development of the Budget Book*—The preparation of this subject book is discussed on page 3, section 1) Leadership, in this letter, Furthermore, the Budget Book for the previous fiscal year (1993-94) was not prepared by my predecessor, Mr. Bob Crout. Mr. Hilliard was the County Administrator during the period that the Budget Book should have been prepared. At no time was he reprimanded in writing or terminated by Mr. Hilliard for not preparing this book.

2) *Schedule and Arrange for the Surplus Property Sale to be Conducted in the Month of July, 1994*—in June

1994, Mr. Hilliard instructed me to inform Mr. Jeffrey Meyer, Purchasing Agent, that the surplus property sale is to be held in July. In accordance with the County ordinance, the surplus property sales are under the direction of the Purchasing Agent. Also, the Purchasing Agent is the custodian of all of the County's fixed assets. Nonetheless, I delivered Mr. Hilliard's instructions to Mr. Jeffrey Meyer during the month of June. I reminded Mr. Meyer about the sale in July. However, during this month, Mr. Meyer was instructed by Mr. Hilliard to postpone the sale at that time. Instead, Mr. Hilliard requested that Mr. Meyer delay processing new year requisitions for capital items in excess of $1,000 until the fist quarter of the fiscal year. To my knowledge Mr. Hilliard had not informed Mr. Meyer and neither did he inform me that Mr. Meyer should resume his preparation for the sale.

3) *Prepare Request for Proposal (RFP) to Solicit Quotes from CPAs for the Annual Audit*—A draft copy of the RFP was prepared by the Purchasing Agent and I reviewed this draft with Mr. Hilliard in June 1994. At that time, I was instructed by Mr. Hilliard to hold off in processing the RFP because of the uncertainty with the new scope of services that were to be added to the RFP (See Exhibit E, SC codes of 1976, section 4-9-155). In July, we had not received any information on whether to expand the scope of services for the audit. At that time, Mr. Hilliard called a representative in the Governor's office to see if the law had been upheld or repealed. Mr. Hilliard placed the call on speaker phone and I was able to listen to the conversation. The representative indicated that he expected the Governor to sign the bill repealing the law very soon. However, until the signing, no action could be taken. Mr. Hilliard then instructed me to stay abreast of this situation and to have the RFP prepared in final form, awaiting the signing of the bill. I instructed

the Purchasing Agent to prepare the RFP in final form (all RFPs are prepared by the Purchasing Agent). After preparation of the RFP, the Purchasing Agent informed me that the RFP was prepared and maintained on file in his computer. As August approached, there was still no decision by the Governor. At this time, I requested a hard copy of the RFP from the Purchasing Agent. The Purchasing Agent then informed me that his system had crashed and all of the data for the RFP was lost. After a concerted effort, the data was re-entered by the Administrative Assistant, Alta Sims. It was near the end of August when this was completed. However, the Governor had not yet signed the bill. In September, I asked the Administrative Assistant to review the final RFP one more time. I also requested from the Purchasing Agent a listing of CPAs that would be invited to bid. The Purchasing Agent indicated that he would have to prepare a new listing because he was unable to locate the files of the former Finance Director that contained the listing used in the previous years. By this time, the Governor had finally signed the bill repealing the law. The bill was signed on August 31, 1994. I have enclosed a copy of pages 1, 18 and 19 of the bill—H3907 (See Exhibit E) as documentation supporting the late signing of the bill. Not fulfilling this requirement within thirty (30) days from the beginning of the fiscal year (July 1, 1994) was directly attributable to the delay in the signing of the bill by the Governor. As proof that the RFP had been prepared, the document and its attachments were given to Mr. Bill Clark immediately following my termination meeting on September 23.

4) *Attendance*—Although Mr. Hilliard verbally stated that attendance was no longer a factor in my probationary evalution, he referenced this area in my termination letter. Also, Mr. Hilliard, on all occasions, inaccurately

reported the number of absences from work during the month of August. Mr. Hilliard only provided in the termination letter two (2) specific dates of absences. However, the two (2) specific dates mentioned in the termination letter were not accurate (further discussion of these dates is below).

During this month, I was absent seven (7) days and not eight (8) as indicated by Mr. Hilliard. Five of these days (8/1, 8/2, 8/16, 8/17, and 8/19) were due to my illnesses. I had an acute viral infection and I received medical attention from the Family Health Center. On each day that I was absent, I notified my office between 8:15 a.m. and 8:30 a.m. and requested that they inform Mr. Hilliard because Mr. Hilliard had not yet arrived to work. At no time did Mr. Hilliard question me about these days off, nor did he ask to review my medical and prescription bills or obtain an excuse from the doctor. Because of Mr. Hilliard's ten year relationship with the Family Health Center (as a member of the Board of Directors until 6/30), it would have been very easy for him to substantiate my claims. Additionally, my illness was very much noticeable to Mr. Hilliard, Mr. Clark and my staff. In fact, during the South Carolina Association of Counties' annual conference held in Hilton Head during August 3-8, I was coughing repeatedly duing the Saturday General Session meeting. After the meeting, Mr. Bill Clark came up to me and said that he did not have to look around the room to know that I was in attendance—instead, he said that he heard me in the back of the room coughing.

The remaining two days absent (8/9 and 8/12) were used as comp time and annual leave (I had earned to date, 132 hours of comp time and had an unused balance

of 68 hours). I contacted Mr. Hilliard on August 8 and his Administrative Assistant, Ruth Van Faussien, answered his phone. She informed me that Mr. Hilliard was on vacation and that he would not be in the office during the entire week. Mr. Hilliard prepared a written memo (on file in the office) indicating that myself and the other two Division Directors were in charge in his absence. In fact, I even contacted Mr. Bill Clark, Division Director/Personnel on August 8. I was told by his staff that he would not return to work until Wednesday, August 10.

Mr. Hilliard also indicated that I worked ten (10) partial days during the month of August. I asked Mr. Hilliard to indicate the days in question. Mr. Hilliard would not respond. Based on my personal records, I worked partially for six (6) days (8/8, 8/10, 8/11, 8/22, 8/29 and 8/31). On August 8, I made the decision to remove my daughter from the Orangeburg County School District as a direct result of the assault. Also, in July, my daughter was hospitalized in Florida for internal problems related to the assault (Mr. Hilliard was informed of this during my July 25 evaluation meeting). Her physical and emotional states were in question at that time. Her doctors, counselor, father, step-father and I agreed that she needed to change school districts. Particularly, since only one of the young men (the juvenile) had been tried for this case. The trial for the other two young men would not be held until September or October, after school began.

On this same day, August 8, I called Mr. Hilliard to inform him that I would need some time off. As indicated earlier, Ms. Van Faussien informed me that Mr. Hilliard was on vacation for the entire week. I used a

total of fifteen (15) hours of comp time during four (4) of the six (6) partial days worked:

8/8 —5 hours	8/11—3 hours
8/10—3 hours	8/22—4 hours

The time taken off for these four (4) days was used to locate an apartment in Sumter County.

The remaining two partial work days; 8/29—2 hours for children's medical appointment and 8/31—2 hours comp time. I contacted Mr. Hilliard on 8/31 to inform him that I would leaving early because of heat exhaustion. The air conditioning unit in the County building was broken and no ventilation was provided in the building (the windows do not open). Ms. Van Faussien informed me that Mr. Hilliard was out of the office all day. The offer to leave work early was made to all of my staff members. Two other staff members left early. The staff members that stayed at work and endured the heat were given 4.5 hours of comp time to be taken off at their leisure.

Mr. Hilliard indicated that I was completely absent on August 10 and 11 and that I misrepresented this information on my time card. As stated above, I was absent only three hours during each of those days. On August 10, the Finance and Purchasing Departments gave a surprise birthday party for the Mail Courier, Ms. Tommie Gray, around lunch time. The food and flowers were purchased on that day and paid for entirely by me. Along with the staff members, I too attended the celebration. To further substantiate my claim, I have enclosed copies of the office long distance telephone records (See Exhibit F) that clearly indicate that I had made calls from my office telephone on both of these days, up through the afternoon. It is just impossible to be in two places at the

same time. Mr. Hilliard's source of information is certainly questionable.

In February 1994, Mr. Hilliard requested that I keep a personal log of my compensatory time earned and used. I specifically asked Mr. Hilliard the method for reporting comp time on the time card. Mr. Hilliard indicated that he did not want comp time to appear anywhere on the time card for exempt employees. Any comp time used would not be reflected on the time card, as time earned also would not be reflected on the time card. I informed both the Finance and Purchasing Departments staff members of this procedure. Immediately, all affected employees began keeping their comp time earned and used in their personal records. Only non-exempt employees were instructed to continue reporting this time directly on their time card. The Assistant Finance Director, Purchasing Agent, Grants Administrator and Accountant II all reported their comp time in the same manner that I reported mine.

5) *Delay in Processing Accounts Payable*—On May 23, 1994, the Accounts Payable Clerk was granted an extended medical leave to have surgery. At that time, it was anticipated that she would return to work in six weeks. However, during the first week of June, the Accounts Payable Clerk notified me of complications that she experienced during surgery. She further indicated that she would not be returning to work after the original six week period. On June 13, I sent a memo to Mr. Hilliard requesting to hire an Accounts Payable Clerk because of the dire necessity to process the voluminous bills in a timely manner. The fiscal year-end was approaching (June 30) and the largest amount of transactions are handled at this time. This problem was exacerbated by the authorized absence of the mail courier

(injured on the job). The Finance Department's Administrative Assistant had assumed the responsibilities of the mail courier in her absence. Mr. Hilliard authorized the Floater, Ms. Desiree Chavis, to temporarily assume the duties of the Accounts Payable Clerk while advertising to fill this position (Ms. Chavis only received two weeks of training for this position). By the end of the month, several qualified applicants had applied for this position. However, the applicants that appeared to be qualified for this position were at salary levels greater than the starting salary level for this position. I contacted Mr. Hilliard and informed him of this dilemma. He indicated that he was not going to hire any more employees at that time above the starting salary range. I held over the advertised position in hopes of receiving additional applications that would best fit within the designated salary structure, to no avail. To my surprise, the applicants received in the second round appeared to be even more qualified than the first round of applicants. At that time, I visited Mr. Bill Clark and I discussed with him my dilemma. He indicated that he would talk with Mr. Hilliard about this situation.

Furthermore, a memo was sent to each Department Head indicating that the deadline for purchases for the remaining fiscal year would be May 1 (Mr. Hilliard established this deadline). However, Mr. Hilliard continuously approved department requisitions beyond the May 1 deadline. Strict adherence to this deadline was essential in processing payments in a timely manner. Mr. Hilliard stated in the June Department Head meeting that he would not allow purchases for next year beyond the pre-established deadlines, as he had done this year. Mr. Hilliard's indecisiveness about filling the Accounts Payable position and his failure to adhere to his originally

established deadline greatly attributed to the delay in processing Accounts Payable.

6) *Personal Indebtedness*—I asked Mr. Hilliard to identify the lien in question. He would not respond. I then informed Mr. Hilliard that this lien could only be with Budget Mini Storage. I further explained to Mr. Hilliard that I rented storage space in August 1992 from Budget Mini Storage upon my arrival to South Carolina. Since inception, I have paid this company every three to four months for my storage. The company has accepted this payment plan from me for almost two years. It is my understanding that my name appears in the paper every four months. However, Mr. Hilliard did not address this situation with me when my name appeared in the paper four months earlier. I was promoted two (2) months after my name appeared in the paper. Nothing was ever said by Mr. Hilliard.

Mr. Hilliard also indicated that this was not in the best interest of the Finance Department nor the County of Orangeburg. It does not appear that Mr. Hilliard is consistent with his treatment concerning personal indebtedness. There are four (4) County employees who have filed bankruptcy and their wages are garnished each pay period. The payroll Clerk remits a payment to the designated Trustee each month. One (1) of these employees, Ms. Desiree Chavis, is employed within the County Administrator's Department. Also, this the same employee that was authorized by Mr. Hilliard to temporarily fill the vacant Accounts Payable position.

Additionally, the Mail Courier, Ms. Tommie Gray, had not paid her hospital medical bill, neither did she make an attempt to provide them with accurate insurance information. Consequently, Mr. Bill Clark gave her a

written reprimand and a two-day suspension with pay (charged against her annual leave).

In another instance, the Accountant II, Ms. Donna Livingston, received a $74.50 cash refund from an employee on the morning of May 25. Ms. Livingston indicated that these funds were delivered to the Treasurer's office in the afternoon on the following day. However, Mr. Summers, County Treasurer, sent me a memo stating that the deposit pouch left by Ms. Livingston only contained $0.50. After much discussion on this matter, I was instructed by Mr. Hilliard to prepare a memo and give Ms. Livingston thirty (30) days to repay the missing $74.00.

Listed above are six instances of employees' indebtedness due to either negligence or their inability to pay. Surprisingly, none of these employees have been terminated for their indebtedness. My storage bills are paid routinely every three to four months, however, my indebtedness was used as a reason for termination.

7) *Unauthorized Use of Telephone*—Since my employment began, it has been standard procedure for employees to reimburse the county for any personal long distance calls. Acceptance of the procedure is supported by the monthly receipts from employees in various departments for personal calls (receipts are recorded in the daily mail log). Prior to receiving the last three months (June, July and August) of phone bills in September, I paid, by check, for all of my personal phone calls.

In July 1, I requested the June phone bill from the Accountant II, Ms. Livingston. I was told by Ms. Livingston that the phone bill was unusually late and it had not yet arrived. At that time, I asked Ms. Livingston to give me the Department's phone bill when it arrived. Prior to July, Ms. Livingston would either directly hand me the

Department's phone bill, or place it on my desk each month. However, for some unknown reason, Ms. Livingston failed to provide me with a copy of the Department's phone bills in the months of July and August. In September, I realized that I had not received a phone bill for a couple of months. I immediately called Ms. Livingston in my office and requested a copy of the phone bills. She looked in her file drawer and could not locate my Department's copy of each month's phone bill. At that time, she stated that she would have to make a copy of the bills from her file copy (the telephone company sends two (2) copies of the bills each month). After receiving the bills on that day, I asked Ms. Livingston to review her files to determine when my last payment was made. Ms. Livingston indicated that I had all of the correct unpaid bills in my hand. I then informed Ms. Livingston that I would total up the bills and give her a check. However, a few days later, the bills mysteriously disappeared from my desk.

Approximately 95% of the long distance telephone calls were made on behalf of my daughter. These calls were made to my daughter's approved counselor, Pastor Sammy Smith—Sumter County, father, step-father, grandparents, Sumter school district and to realtors (in looking for an apartment).

In reviewing the phone bills in question, it was quite interesting to note that Ms. Donna Livingston, Accountant II had several personal phone calls on each of the same bills that included my phone calls (See Exhibit G). However, Ms. Livingston was not reprimanded or terminated for using County-owned equipment.

8) *Failure to Reimburse Petty Cash*—During the second week in June, I received $20 from the petty cash fund to purchase film and supplies for the Edisto Drive HOME

project. Approximately $7 was left from the purchases. I left to go on vacation (6/14-6/17) the day after the film was processed and forgot to return the funds before leaving (the Grants Administrator gave Ms. Shuler the receipt for the film). On June 28, I gave the $7 to the Administrative Assistant, Alta Sims, and I asked her if she would give the money to the petty cash custodian, Ms. Jannella Shuler. I had a dental appointment at 4:00 p.m. that afternoon and Ms. Shuler had not returned from lunch. A few days later, the Administrative Assistant gave the $7 back to me because she forgot to give the funds to Ms. Shuler. By that time, Ms. Shuler had gone on vacation. I placed the money in my purse and I just simply forgot about it. In September, Ms. Shuler informed me that she could not reimburse the $200 petty cash fund until she received my $7. At that time, I went to the bank and cashed a check and gave Ms. Shuler $7.

Approximately one week later, Ms. Shuler and I were establishing new procedures for replenishing the petty cash fund. At that time, she indicated that an employee, Ms. Tina Shirer, owed the petty cash fund $20 a few months earlier and it was in excess of thirty (30) days before she reimbursed the fund. However, Ms. Shuler was not reprimanded or terminated.

9) *Reimbursement from Travel Advance*—During the week immediately following the SCAC conference in Hilton Head (August 8-12), I prepared my travel expense voucher for review by Mr. Hilliard. However, Mr. Hilliard was on vacation the entire week. On the day that Mr. Hilliard returned from vacation (8/15), I presented to him my travel expense voucher. I informed him that the voucher did not include tips for the hotel's bellman and charges for valet parking. Mr. Hilliard said that I could not include the valet parking, but tips for my baggage would be allowed. I corrected my travel form to

include the tips paid for my luggage and on that same day (8/15) and I took my travel form upstairs to Mr. Hilliard's office. The form indicated that I owed the County $9.48. I asked Mr. Hilliard to please return the form to me after it was approved. On August 25, Mr. Hilliard returned my travel form to the Department (recorded in the daily mail log). Ms. Shuler received the form and reviewed it and then gave the form to Ms. Livingston. Ms. Livingston gave me the form in September. At that time, I asked Ms. Livingston how is it that she received my form. She stated that Ms. Shuler had given it to her to review the amount of the advance reported. I then indicated that I wanted to pay cash instead of writing a check. A few days later, Ms. Livingston attached a note to my advance indicating that I owed $9.48. That next morning I went to the bank and cashed a check. I placed the money in Ms. Livingston's drawer. Upon her return to her desk, I informed her that the money was in her drawer.

As indicated above, I was unable to meet the five day period because Mr. Hilliard (he is the only one who can approve my travel form) was on vacation during this time. I submitted my travel form in a timely manner (on the day of his return). However, several weeks passed before the travel form was returned to me. I think it is unfair to accuse me of "exceeding some thirty days" before reimbursing the travel advance account.

* * * *

10) *Failure to Notify Immediate Supervisor of Change of Address and Telephone Number*—On September 22, I visited Mr. Hilliard's office to inform him that I would be off on Friday, September 23, to pack and move my belongings from my residence in Orangeburg to Sumter. At that time, I wss informed by Ms. Van Faussien, Mr. Hilliard's Administrative Assistant, that Mr. Hilliard would

not be in the office that day. I asked Ms. Van Faussien if she would let Mr. Hilliard know that I would be moving. Ms. Susan Matthews, Clerk to the County Council, overhead the conversation and asked me where was I moving. When I replied, "Sumter", Ms. Matthews asked, "why Sumter". I then replied that I needed to change school districts for my children.

Although I acquired another residence in Sumter County, I did not give up my legal residence in Orangeburg County until September 30. In fact, Mr. Bill Clerk sent me some forms and a check by certified mail on September 27 to my residence in Orangeburg (See Exhibit H). Furthermore, to ensure that people could call me during the days that I stayed in Sumter, I requested Southern Bell to put a mesage on one of my two Orangeburg phone lines. The mesage listed in Sumter telephone number (as referenced by Mr. Hilliard in my termination letter).

During my employment orientation, I was never told by Mr. Hilliard or Mr. Clark that I could not have two (2) residences. In fact, Mr. Hilliard indicated that my predecessor, Mr. Bob Crout, had residences both in Orangeburg and Anderson Counties. Also, I was never informed that I had to be on call 24 hours a day. Mr. Hilliard obviously tried to reach me over the weekend because I was absent only one day during the entire month of September (September 22). I was terminated the next day, September 23.

At the time that I found an apartment in Sumter, Mr. Hilliard was on vacation. I did, however, verbally inform Mr. Clark in August that I recently acquired an apartment in Sumter. At that time, I briefly explained to Mr. Clark that this was necessary because of the situation with my daughter.

11) *Failure to Follow Specific Instructions Regarding Grant Fund*—Upon my return from the SCAC conference in Hilton Head on August 8, I was informed by my Grants Administrator, Michelle Knight, that we (the County) had serious problem with the TriCasa grant. Ms. Knight indicated that TriCasa received a $10,000 reimbursement for the 1993 grant and that they inappropriately spent these funds on their operating costs. The funds were to be paid to the County for expenditures paid by the County on behalf of TriCasa. Representative Gilda Cobb-Hunter contacted me that same day and explained what happened. She offered a proposal for repayment of these funds, however, I told her that I would have to discuss her proposal with Mr. Hilliard upon his return from vacation on August 15. In the interim, I was informed by Ms. Knight that the County had requested reimbursement from the Governor's Office in February 1994 for expenditures that were never made. Ms. Knight further informed me that this was in violation of State and Federal laws. The grant agreement specifically indicates that all payments will be made to the grantee on a reimbursement basis. I then asked who prepared the reimbursement request in February (this request was prepared two weeks after my employment date). Ms. Donna Livingston indicated that she prepared this request based on specific instructions and authorization from Mr. Hilliard. She further stated that Mr. Hilliard told her to prepare the checks for the contractors and make a copy of these checks to be included in the grant reimbursement request. However, Ms. Livingston said that she was instructed to hold the check ($6,600) for one of the contractors. The contractor, Mr. Bill Gray, had not finished the job at that time. Mr. Gray's check was not released until August.

When Mr. Hilliard returned from vacation, Ms. Knight, Ms. Livingston and I met with him to discuss the situation. After much discussion, Mr. Hilliard instructed me to write a letter stating our counter-offer to Representative Cobb-Hunter. I returned to my office and immediately called Ms. Cobb-Hunter. For several days, we played telephone tag. In the interim, I requested the Grants Administrator to prepare the letter indicating our counter-offer. I was out ill most of that week and therefore, I did not get a chance to review the letter until the following week. Upon my return to work, I noted that Ms. Cobb-Hunter had returned my latest phone call. I called her again and finally we talked on August 31. I briefly discussed our meeting with Mr. Hilliard. At that time, Ms. Cobb-Hunter asked if she could come right over to visit me. She wanted to further discuss the situation. Ms. Cobb-Hunter came over about 9:30 a.m. I invited Ms. Knight to sit in on the meeting. I showed Ms. Cobb-Hunter a draft copy of the letter that was prepared and we discussed its contents. We gave her several documents and a copy of our funds statement outlining how the funds are to be repaid.

Although the final form of the letter was not prepared, we discussed every point with Ms. Cobb-Hunter. Again, it seems unfair that I was terminated because a letter was not delivered to Ms. Cobb-Hunter and nothing was done about the fraudulent reimbursement request that was sent to the state.

APPENDIX F

[Filed Jul. 7, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Civil Action No.: 5:97-1412-06BC

AVIS W. BUTLER,

Plaintiff,

v.

COUNTY OF ORANGEBURG, SOUTH CAROLINA, and DONNIE L. HILLIARD in his individual and official capacities,

Defendants.

MOTION TO AMEND COMPLAINT

The Plaintiff moves this Honorable Court to amend Paragraph 1 of the complaint to include §§ 1983 and 1988 of Title 42 United States Code. The amended paragraph is as follows:

Paragraph 1. This action arises under the common and statutory laws of South Carolina, under the Fourteenth Amendment of the United States Constitution, and under the laws of the United States, particularly Title 42 United States Code §§ 1983, 1988 and 2000e *et seq.* (Title VII), as amended.

In support of this motion, the Plaintiff states:

1. Plaintiff's civil and constitutional rights were violated when Defendant Hilliard, acting under pretense and color of state law, statutes and authority,

willfully, knowingly and with specific intent deprived the Plaintiff of her constitutional rights, privileges and immunities secured by the Constitution and laws of the United States. Defendant Hilliard retaliated against the Plaintiff by placing her on probation and subsequently terminating her for having complained about his sexual harassment of an employee. The Defendant violated clearly established laws secured by the Fourteenth Amendment of the Constitution and laws of the United States, particularly Title 42 US Code §§ 2000e as amended.

2. As a direct and proximate result of said violations of Plaintiff's constitutional rights, the Plaintiff suffered physical and mental anguish, emotional distress, embarrassment, humiliation and losses to both her professional and personal reputations.

3. As a further direct and proximate result of the violations of Plaintiff's constitutional rights, Plaintiff was forced to retain counsel to represent her during the South Carolina Employment Security hearing and EEOC's investigation. Additionally, to prosecute this action, Plaintiff was forced to represent herself as a *pro se* litigant. The Plaintiff has incurred costs and reasonable fees as a *pro se* litigant and was obligated and has paid reasonable attorney's fees for services in connection with and in furtherance of this action arising out of the conduct of the Defendants.

Wherefore Plaintiff prays that this court grants Plaintiff's motion in all respects. Attached herein is a copy of the proposed amended complaint.

Respectfully submitted,

/s/ Avis W. Butler
AVIS W. BUTLER, *Pro se*
111 Radcliff Drive
Sumter, South Carolina 29150

Dated: July 2, 1997
Sumter, South Carolina

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Civil Action No.: 5:97-1412-06BC

AVIS W. BUTLER,

Plaintiff,

v.

COUNTY OF ORANGEBURG, SOUTH CAROLINA, and DONNIE L. HILLIARD in his individual and official capacities,

Defendants.

AMENDED COMPLAINT
(Jury trial requested)

The Plaintiff, above-named, complaining of the Defendants herein, would respectfully show unto this honorable Court the following:

JURISDICTION

1. This action arises under the common and statutory laws of South Carolina, under the Fourteenth Amendment of the United States Constitution, and under the laws of the United States, particularly Title 42 United States Code §§ 1983, 1988 and 2000e *et seq.* (Title VII), as amended.

2. This court has jurisdiction of this case under the provision of the United States Code, Title 28, §§ 1331, 1337, 1343, and 1441(c).

3. The common law of the State of South Carolina is consistent with the Constitution and laws of the United States and should be extended to govern this District Court in the trial and disposition of this case.

4. The Plaintiff, Avis W. Butler, is a citizen and resident of Sumter County, South Carolina.

5. The Defendant, Orangeburg County, has administrative offices located at 437 Amelia Street, Orangeburg, South Carolina 29115.

6. The Defendant, Donnie L. Hilliard, is, upon information and belief, a resident of Orangeburg, South Carolina. In his official capacity, he was the Administrator of Orangeburg County during the events in question.

FACTS

7. On or around January 18, 1994, the Plaintiff began her employment with Orangeburg County as Director of Finance.

8. On or around June 1, 1994, Plaintiff was promoted to the position of Division Director of Administrative Services. At that time, the Plaintiff was told by the Defendant, Donnie Hilliard, that her probationary status had ended because of her promotion. The Plaintiff's promotion included a pay-grade and salary increase and additional supervisory responsibilities of six (6) Departments.

9. On or around July 19, 1994, Defendant Hilliard issued a directive to the Plaintiff to demote an employee, who was under the general supervision of the Plaintiff, in accordance with the Defendant's Administrative Demotion Policy.

10. On the next day, on or around July 20, 1994, the Plaintiff discussed the directive issued by Defendant Hil-

liard with the employee's immediate supervisor. At that time, the supervisor complained about the sexual harassment of the employee by Defendant Hilliard. The supervisor informed the Plaintiff that she and another employee witnessed the sexual harassment of the employee on or around July 18, 1994. Furthermore, the supervisor complained that she was offended by Defendant Hilliard's unprofessional behavior.

11. On the same day, on or around July 20, 1994, the Plaintiff informed Personnel of her conversation that had just taken place with the employee's supervisor. At that time, Personnel agreed to discuss the incident with Defendant Hilliard on or around July 21, 1994. The Plaintiff then informed the supervisor that Personnel would handle the matter at hand.

12. On or around July 21, 1994, upon information and belief, Defendant Hilliard accosted the supervisor and wanted to know who complained to Personnel about him.

13. On or around July 22, 1994, the Plaintiff was informed by the supervisor of Defendant Hilliard's behavior and his demand to know of the person who complained to Personnel. The supervisor informed the Plaintiff that Defendant Hilliard used profane language while requesting this information and that he said "ugly and unpleasant" things about the Plaintiff. Immediately, the Plaintiff informed Personnel of this conversation. Personnel informed the Plaintiff that they too felt that Defendant Hilliard would respond in this manner because of Defendant Hilliard's noticeably silent behavior during and after the time that the sexual harassment incident was presented to him by Personnel.

14. On the same day, on or around July 22, 1994, Defendant Hilliard telephoned the Plaintiff and indicated

that he needed to schedule a performance evaluation with her on the following Monday, July 25, 1994.

15. On or around July 25, 1994, Defendant Hilliard met with the Plaintiff and handed her a letter of July 22, 1994, informing the Plaintiff of alleged problems with her performance and that her probationary period was to be extended for three (3) months. This was the first time that the Plaintiff had ever received verbal or written notice about any performance deficiencies since she began her employment with the Defendant.

16. On or around September 23, 1994, the Plaintiff was terminated by Defendant, allegedly on the basis of problems with her performance. No other verbal or written notices were given to the Plaintiff about performance deficiencies since her previous performance evaluation on July 25, 1994.

17. Upon information and belief, there were no such problems with the Plaintiff's performance.

18. Upon information and belief, the alleged problems were trumped-up as a pretext to terminate the Plaintiff in retaliation for having complained about Defendant Hilliard's sexual harassment of an employee.

CONDITIONS PRECEDENT

19. Plaintiff timely filed charges of discrimination against defendant with the SHAC and the EEOC in satisfaction of the requirements of Title VII.

20. Plaintiff brings this action within ninety days of receiving a Notice of Right to Sue from the U.S. Department of Justice.

FOR A FIRST CAUSE OF ACTION—Federal Law (Violation of Title VII)—Retaliation

21. By the acts and practices alleged above, Defendants illegally terminated Plaintiff in retaliation for her complaint of sexual harassment of another employee, in violation of Title VII.

DAMAGES

22. As a direct proximate result of the actions of the defendant as described above, Plaintiff has sustained back and front losses of pay benefits, as well as damages by way of physical and mental anguish; pain and suffering; emotional distress, humiliation and embarrassment.

WHEREFORE, the Plaintiff asks this court for the following:

a) That the Plaintiff be awarded the salary and benefits which she has lost since she first began employment with Orangeburg County, now and into the future;

b) That the Plaintiff be awarded damages for the loss to her professional reputation, loss of earning capacity, and emotional stress;

c) That the Plaintiff be awarded punitive damages whenever available under the law;

d) That the Plaintiff be awarded reasonable attorney's fees;

e) That the Plaintiff be awarded whatever other damages this Court deems just and proper.

Respectfully submitted,

/s/ Avis W. Butler
AVIS W. BUTLER, *Pro se*
111 Radcliff Drive
Sumter, South Carolina 29150

Date Amended: July 2, 1997
Sumter, South Carolina

Supreme Court, U.S.
FILED
SEP 16 1999
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No. 99-289

In The

Supreme Court of the United States

AVIS W. BUTLER,

Petitioner,

versus

COUNTY OF ORANGEBURG, SOUTH CAROLINA and DONNIE L. HILLIARD in his individual and official capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. Petitioner incorrectly asserts that there is a split of authority on the issue of whether one must have a subjective or objective belief that a practice they oppose under Title VII is unlawful.

Petitioner claims that this Court should grant certiorari because the federal circuits are split as to whether a plaintiff's belief that she opposed a practice made unlawful by Title VII is measured by a subjective or an objective standard. She correctly states that the Fourth, Eighth, Ninth and Eleventh Circuits include an objective component in their analysis. She then claims that the Fifth and Seventh Circuits, along with, surprisingly, the Ninth Circuit again, utilize a standard of subjective good faith. Petitioner is under the mistaken belief that a standard of "objective reasonableness" is a different, higher standard than one which requires "reasonableness." However, the cases she cites in support of this proposition prove otherwise.

Petitioner first cites *Pasqua v. Metropolitan Life Insurance Co.*, 101 F.3d 514 (7th Cir. 1996). In *Pasqua*, the Seventh Circuit affirmed the lower court's decision granting summary judgment, but found that the lower court erred in determining that the plaintiff could prove a *prima facie* case of retaliation. Petitioner quotes *Pasqua* to the extent that the decision notes the lower court's failure to correctly apply the "reasonable belief" standard. However, Petitioner omits that part of *Pasqua* wherein the court specifically states:

> Pasqua's *subjective* beliefs are irrelevant. Pasqua was required to establish that he had a *reasonable* belief that the rumors amounted to harassment based upon sex.

Id. at 518 (emphasis added).

This language makes it quite plain that an objective standard is one of reasonableness, while a subjective standard is one of good faith. The Seventh Circuit clearly applies the former. The lower court's confusion in *Pasqua*

as to how to apply that standard is irrelevant to this case.[1]

Petitioner also cites *Moyo v. Gomez*, 40 F.3d 982 (9th Cir. 1997) to support her claim. There, the Ninth Circuit stated the standard to be applied quite plainly:

> The reasonableness of Moyo's belief that an unlawful employment practice occurred must be assessed according to an *objective* standard . . .

Id. at 985 (emphasis added).

Again, Petitioner has cited a case which is directly contrary to her position.

Finally, Petitioner cites *Long v. Easterfield College*, 88 F.3d 300 (5th Cir. 1996). There, the court used neither the words "objective" nor "subjective" in discussing the appropriate standard. However, the court used the same language as *Pasqua* in stating that the touchstone is whether the plaintiff had a " 'reasonable belief' that the [offender's] conduct violated Title VII." *Id.* at 305. While not specifically calling this an objective standard, the fact that the belief must be reasonable makes that point quite obvious. Further, recent district court decisions in the Fifth Circuit set forth this standard unequivocally. *Byers v. The Dallas Morning News, Inc.*, 1999 WL 20953, *10 (N.D.Tex. Jan. 7, 1999) (summary judgment proper where plaintiff's opposition not "objectively reasonable"); *accord, Turner v. Claims Administration Corp.*, 993 F.Supp. 982, 989 (N.D.Tex. 1998); *Fritz v. Integrated Health Services, Inc.*, 1997 WL 472498, *3 (N.D.Tex. 1997) (unpublished opinion); *Harvey v. Chevron U.S.A., Inc.*, 961 F.Supp. 1017,

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[1] The lower court in *Pasqua* relied on *Jennings v. Tinley Park Community Consolidated School Dist. No. 146*, 796 F.2d 962 (7th Cir. 1986), which requires a plaintiff to prove that he held a "reasonable belief" that he was opposing a practice unlawful under Title VII. *Id.* at 967. The *Pasqua* lower court then applied this standard in a subjective fashion, with no analysis of whether a reasonable person would have held the same belief. *Pasqua v. Metropolitan Life Insurance Co.*, 1995 WL 683772, *7 (N.D.Ill. 1995) (unpublished opinion).

1033 (S.D.Tex. 1997) (relying on Eleventh Circuit precedent).

The cases cited by Petitioner to support her contention do not do so because there is no split of authority on this issue. In fact, these cases only prove that the objective standard utilized by the lower court in this case to grant Respondent's motion for summary judgment is universally recognized.

This standard was implicitly adopted by this Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), wherein the Court stated, "Conduct that is not severe or pervasive enough to create an *objectively* hostile or abusive work environment – an environment that a *reasonable person* would find hostile or abusive – is beyond Title VII's purview." *Id.* at 20 (emphasis added). It should be (and is) applied by the district courts to opposition retaliation cases as well. To hold otherwise would lead to absurd results. In cases such as this one, where the opposition was by one with no first-hand knowledge of the underlying facts, such a contradictory standard would require the alleged victim of the harassment to meet an objective standard while the party opposing the harassment (but who did not witness it) would be invariably protected by her own subjective beliefs.

Accordingly, the petition for a writ of certiorari on this ground should be denied.

II. Petitioner's remaining grounds fail to justify a writ of certiorari because she does not dispute the lower court's finding that she cannot prove pretext as to the legitimate non-discriminatory reasons offered for her termination.

Petitioner asserts that this Court should grant her petition because the lower court held that she could not satisfy a *prima facie* case of retaliation. However, the lower court did not conclude its analysis there. The court held that even if Petitioner could make out a *prima facie* case, she could not prove pretext as to the numerous,

legitimate, non-discriminatory reasons for her termination. Petitioner assigns no error to this alternative basis for summary judgment.

To survive summary judgment, Petitioner was obligated to offer evidence which would allow a reasonable jury to determine that the reasons given for her termination were pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 505-512 (1993). Because she assigns no error to the lower court's conclusion that she did not make this required showing, any argument over whether she made out a *prima facie* case of retaliation is academic. The Court should not expend its resources by deciding a question that will not affect the outcome of the case. Yet, by asking the Court to review whether she made out a *prima facie* case of retaliation when the district court held that even if she did, she made out no triable issue of fact on the issue of pretext, that is precisely what Petitioner is seeking. This Court's review of this case would be no more than an academic exercise.

III. Petitioner's assertion that the lower court incorrectly found that she lacked a property interest necessary to support a due process claim fails because she was an at-will employee as a matter of law.

Petitioner alleges that she attained regular status as a County employee and that she was, therefore, entitled to a grievance hearing regarding her termination. Viewing the facts in a light most favorable to Petitioner, the court considered her due process claim under 42 U.S.C. § 1983.

The court correctly ruled that Petitioner had no property right to continued employment. Such rights are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Under South Carolina law, county employees are presumed to be at-will absent evidence that the parties

have contracted otherwise. *Epps v. Clarendon County*, 405 S.E.2d 386 (S.C. 1991); *Stiles v. American General Life Ins. Co.*, 516 S.E.2d 449 (S.C. 1999).

In addition to South Carolina's presumption that County employment is at-will, Orangeburg County specifies by ordinance that its employees are at-will. Orangeburg County Code § 2-226. Accordingly, the district court properly held that Petitioner lacked a protectible property interest in her County employment because she failed to offer any evidence that her presumptive and statutory at-will status had been altered. [Pet. for Writ of Cert., Appendix C p. 25a-26a] *See, Bishop v. Wood*, 426 U.S. 341, 345-47 (1976) (an employee who served "at the will and pleasure" of a city had no entitlement under state law to his continued employment and therefore no property interest).

Finally, it should be noted that the court denied all of Petitioner's § 1983 claims against the county because she failed to timely request a grievance hearing per County ordinance. [Pet. for Writ of Cert., Appendix C p. 25a] The court correctly found that Petitioner cannot establish liability as to the County because her failure prevented the County from reviewing her termination. Accordingly, she cannot establish a governmental "policy or custom" of the County which caused her harm. *Morell v. Dep't of Social Services of the City of New York*, 436 U.S. 658, 694 (1978).

Accordingly, Petitioner had no property right to continued employment.

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Attorneys for Respondents

Sec. 2-226. Purpose.

The purpose of the rules and regulations set out in this division shall be to establish a consistent personnel policy for the county and to establish guidelines governing employees of the county. Accordingly, this division shall not apply to employees of any outside agency that may receive appropriations from the county. It shall describe the county's general philosophy concerning policies and procedures and shall in no way form a contract between the employees and the county. The provisions of this division are subject to change at anytime upon being amended by ordinance of the county council. Further, notwithstanding any of the provisions herein, all employees of the county are employees-at-will who may quit at any time for any or no reason and who may be terminated at any time for any or no reason.

(Ord. No. 78-8-12, Pt. I(1), 8-28-78; Ord. No. 87-11-21, § 1, 11-2-87)

Supreme Court, U.S.
FILED
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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ARGUMENTS

I. PETITIONER CORRECTLY ASSERTS THAT THERE IS A SPLIT OF AUTHORITY ON THE ISSUE OF WHAT TYPE OF "REASONABLE BELIEF" ONE MUST POSSESS CONCERNING THE CONDUCT SHE IS OPPOSING UNDER TITLE VII.

Respondents' first responsive argument is erroneous in several respects. The most obvious and blatant error is Respondents' claim that ". . . there is no split of authority" on the issue of whether one must have a subjective or objective belief that a practice she is opposing under Title VII is unlawful and "that the objective standard utilized by the lower court . . . is universally recognized." [Response to Petition for Writ of Cert., p. 3.] Respondents erroneously assert that the Seventh Circuit applies an objective standard. *Id.* at pp. 1-2. To further support her position that the circuits are split on the issue of "reasonable belief" and to show the Honorable Court that Respondents' Argument Number One is erroneous, Petitioner offers the court the case of *Dey v. Colt Const. and Dev. Co.*, 28 F.3d 1446 (7th Cir. 1994).

Dey, supra, involved a retaliation claim under Title VII, and also an appellate review of a grant of a summary judgment motion. *Dey,* 28 F.3d at 1457. In *Dey,* as to the retaliation claim, the Seventh Circuit held that " 'it is sufficient if the plaintiff has a reasonable belief that she is challenging conduct (that violates) Title VII.' " *Dey,* 1446 F.3d at 1458 (citing *Holland v. Jefferson Nat'l Life Ins. Co.,* 883 F.2d 1307, 1314 (7th Cir. 1989); also *Jennings v. Tinley Park Community Consolidated School Dist. No. 146,* 796 F.2d 962, 967 (7th Cir. 1986), *cert. denied,* 481 U.S. 1017 (1987). *Dey* also held that "[e]ven if a trial were to reveal that Dey's work environment was neither hostile nor abusive, that would not affect the sincerity or reasonableness of her belief that Chernoff

had acted in violation of the law." *Id.* at 1458 (cites from the 7th Circuit omitted). Critically important, the *Dey* Court noted that "it is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case." *Id.* (citing *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982). Contrary to Respondents' claim, that the objective standard is "universally recognized" among the federal circuits, *Dey* unequivocally establishes that there is a split on the "reasonableness issue" among the circuits and that Respondents are egregiously wrong in its assertion that no such split exists. [Response to Petition for Writ of Cert., p. 3]

Further, Respondents' reliance upon *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), as the implicit creator of an objective reasonable standard in retaliation cases is misplaced. Respondents correctly state that the *Harris* Court stated: "Conduct that is not severe or pervasive enough to create an objective hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." [Response to Petition for Writ of Cert. p. 3]. However, Respondents failed to point out that the *Harris* Court also said in the next sentence: "Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's conditions employment, and there is no Title VII violation." *Harris*, 510 U.S. at 20. Therefore, this Court has implicitly adopted a subjective component to the reasonable belief standard in opposition retaliation cases, and the Seventh Circuit in *Dey* relied upon *Harris* to impart a subjective component in the reasonable belief inquiry in retaliation cases—an analytical framework that differs from the circuits that use the objectively reasonable standard. *Dey*, 28 F.3d at 1452-1454.

In addition to failing to acknowledge the split of authority on the issue of whether one must have a subjective or objective belief that a practice she opposes under Title VII is unlawful, Respondents do not acknowledge the fact that the First and Fourth Circuits, contrary to other federal circuits, use a balancing test for assessing opposition clause claims. "Whether an employee has engaged in protected opposition activity, turns upon balancing 'the purpose of the Act to protect persons engaging *reasonably* in activities . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998) (emphasis added); *see also Kubicko v. Ogden Logistics Services*, 181 F.3d 544 (4th Cir. 1999). The Fourth Circuit has held "that under this balancing test, as long as an employee complains to his or her employer or participates in an employer's informal grievance procedure in an orderly and nondisruptive manner, the employee's activiites are entitled to protection under section 704's opposition clause." *Laughlin*, 149 F.3d at 260. Therefore, in the Fourth Circuit under recent decisions, the objectively reasonable standard simply becomes the reasonable standard when used in conjunction with the balancing test. This new hybrid standard appears to depart from, but does not overrule previous case law in the Fourth Circuit that adhered to the more stringent objective reasonable standard. *See Kralawec v. Prince George's County*, 679 F.2d 883 (4th Cir. 1980), *cert. denied*, 459 U.S. 872 (1982).

Respondents note that Petitioner "suprisingly" categorized the Ninth Circuit as using both a subjective and an objective standard of good faith. Petitioner submits that she did include the Ninth Circuit in both analytical camps. This was not an academic slip of the pen. The Ninth

Circuit does use both standards, and it has used both standards in one case. For example, in *Moyo v. Gomez*, 40 F.3d 982 (9th Cir. 1994), the Ninth Circuit said: "It is not necessary, however, that the employment practice actually be unlawful; opposition clause protection will be accorded whenever the opposition is based on a 'reasonable belief' that the employer has engaged in an unlawful employment practice. . . An erroneous belief that an employer engaged in an unlawful employment practice is reasonable, and thus actionable under 704(a), if premised on a mistake made in good faith. A good faith mistake may be one of fact or of law." *Moyo*, 40 F.3d at 984. The *Moyo* Court also stated that the Plaintiff's beliefs "that an unlawful employment practice occurred must be assessed according to an objective standard. . ." *Moyo*, 40 F.3d at 985. *Moyo*'s confusing application of the subjective and objective analytical framework in assessing the employee's belief in an opposition clause case under Title VII is a testament to Petitioner's claim that judicial confusion exists within the federal circuits. It is because of this confusion that the Court should grant the petition to settle the issues for the betterment of Title VII jurisprudence within the circuits.

II. PETITIONER DISPUTED THE LOWER COURT'S FINDING THAT SHE CANNOT PROVE PRETEXT AS TO THE LEGITIMATE NON-DISCRIMINATORY REASONS OFFERED FOR HER TERMINATION AND SHE WAS NOT REQUIRED TO RAISE THE PRETEXT ISSUE IN HER PETITION.

Respondents erroneously assert that Petitioner accepts the lower court's finding that she cannot prove pretext as to the legitimate non-discriminatory reasons offered for her termination. In an effort to establish a genuine issue of material fact at the trial court, Petitioner submitted detailed responses, by the way of Plaintiff's Responses to

Defendants Interrogatories, as part of her extensive response to Defendants' Motion for Summary Judgment. [Plaintiff's Response to Defendants' Motion for Summary Judgment, pp. 7-20; Butler Deposition, Exhibit 3]. Petitioner also refuted the reasons given for her termination on at least two occasions prior to the Motion for Summary Judgment. [Butler Depo., Exhibits 2, 3]. She also raised the pretextual issue at the Fourth Circuit Court of Appeals. [Informal Brief, pp. 10-18; Petition for Rehearing with Suggestion for Rehearing En Banc, pp. 9-13]. Thus, Respondents' claim and suggestion that Petitioner quietly sat back and accepted the lower court's erroneous finding on pretext is patently without merit.

As to Respondents' claim that Petitioner failed to properly preserve the pretext issue before this court, Petitioner submits that she was only required to show compelling reasons why the petition should be granted, not the errors which consisted of erroneously factual findings or the misapplication of properly stated rule of law. [Rules of the Supreme Court of the United States, Rule 10]. Although Petitioner was not required to raise the pretext issue in the petition, she raised it in the Statement of Facts and submitted a detailed response to each reason for termination in the Petition. [Pet. for Writ of Cert., pp. 6-7 and Appendix E, pp. 43a-58a].

III. PETITIONER ESTABLISHED THAT SHE HAD A PROPERTY RIGHT IN HER GOVERNMENTAL EMPLOYMENT AND SHE HAS PROVIDED THE COURT A COMPELLING REASON WHY THE PETITION SHOULD BE GRANTED TO REVIEW THIS CONSTITUTIONAL ISSUE.

Petitioner, the holder of an MBA degree and a Certified Public Accountant, was hired by Respondent County on January 18, 1994. [Butler Depo. pp. 12, 19.] County Ordinance provided that Petitioner's probationary period

would end after six months of continual employment, unless extended before the probationary period ends. [Pet. for Writ. of Cert., App. D, 31a, 32a.] Petitioner completed her probationary period as a governmental employee with Respondent County on July 18, 1994. [Pet. for Writ. of Cert. App. C, p. 9a.] On July 25, 1994, after Petitioner's probationary period expired, Respondent Hillard issued Petitioner a letter dated July 22, 1994 purporting to extend her period of probation for an additional three months. Based on Section 2-248 of the County Ordinance, Petitioner unequivocally acquired the right to grieve a termination by the time Respondent Hillard purported to extend her probation. [Pet. for Writ. of Cert., App. A, pp. 35a-42a.] Respondent Hilliard's classification of Petitioner as a probationary employee deprived her of the regulatory right to grieve her termination. *Id.*; [Petitioner's Reply to Response to Petitioner for Writ of Cert., App. A, pp. 1a-3a.] Even though Petitioner was classified as a temporary employee and deprived of grievance rights, she sent a letter to the County Council after she had a meeting with the state unemployment officials. [Petitioner's Reply to Response to Pet. for Writ of Cert., App. B, p. 4a.]

Petitioner submits that once she became a regular employee of Respondent County, her at-will status became irrelevant as to whether she had acquired property rights as recognized by this Court under *Perry v. Sinderman*, 408 U.S. 593 (1972). The precedent from this Court required the Respondent County to "comply with its regulations that are congruent with the requirements of constitutional due process." *Detweiler v. Com. of Va. Dept. of Rehab. Servs.*, 705 F.2d 557, 561 (4th Cir. 1983) (citing *United States v. Caceres*, 440 U.S. 741, 749 (1979)).

Petitioner asserts in the Petition that the lower courts deviated from its own precedent and controlling authority

in deciding the due process issue, a compelling reason for this Court to grant the petition. Respondents have failed to discuss the applicability of the case law that Petitioner raised in the petition concerning the due process issue. In actuality, the Respondents have failed to address any of the issues that were raised on this point in the Petition.

As to the "policy or custom" issue that Respondents raised, "proof of the existence of a municipal policy or custom under Section 1983 does not require a plaintiff to evidence numerous similar violations." *Hall v. Marion School District No. 2*, 31 F.3d 183, 195 (4th Cir. 1994). Citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986). This Court held that in certain circumstances, a single violation is sufficient to invoke municipal liability. The court reasoned that to hold a municipality liable for a single violation, the decisionmaker must possess "final authority to establish municipal liability with respect to the action ordered." *Id.* at 481, 106 S.Ct. at 1209 (footnote omitted). Also citing *The City of St. Louis v. Prapronik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). This Court further defined when a municipality can be held liable for a single constitutional violation. "First, . . . municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, that is, acts which the municipality has officially sanctioned or ordered." Second, only those municipal officials who have "final policymaking authority may by their actions subject the government to Section 1983 liability." Third, whether a particular official has "final policymaking authority" is a question of state law. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business. *Id.* 485 U.S. at 123, 108 S.Ct. at 924 (emphasis in the original). In *Praprotnik*, the Court held that the City of St. Louis

could not be held liable for the allegedly unconstitutional action because the supervisors who allegedly engaged in unconstitutional behavior did not possess final policy-making authority. *Id.* 485 U.S. at 130, 108 S.Ct. at 927-28. However, the Court reiterated that a municipality can be held liable for the acts of their employee if such actions are ratified by the final policymakers. As explained by the Court, "[w]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Id.* at 127, 108 S.Ct. at 926 (emphasis in original).

Although Respondent Hilliard was not considered to have "final policymaking authority", the Respondent County is liable. The State of South Carolina has granted authority to the governing body of the County, County Council, to hear grievances and to render the final approval or decision of the grievance committee. [S.C. Code § 8-17-120 *et seq.*]. Butler requested a hearing from County Council on October 11, 1994 in a written document dated October 7, 1994 because Hilliard denied her of her rights to procedural due process. [Butler depo. Ex. 2; Affidavit of Butler]. The Council discussed Butler's request and voted to deny her request. [App. B, p. 3a]. Butler had satisfactorily performed her six-months of initial service, however, she was not granted regular status. [Butler depo. Ex. 2; Affidavit of Butler, Pet. for Writ of Cert., App. F, 59a]. Therefore, by voting to allow Butler's dismissal to stand, County Council approved and subsequently ratified Hilliard's unconstitutional behavior. Accordingly, the County may be held liable for the acts of its final policymakers, County Council.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

AVIS W. BUTLER
Pro Se
111 Radcliff Drive
Sumter, SC 29150
(803) 534-1204

APPENDICES

APPENDICES

APPENDIX A

COUNTY OF ORANGEBURG
P.O. Drawer 9000, Orangeburg, S.C. 29116-9000
Telephone 803/533-1000

July 22, 1994

MEMORANDUM

TO: Avis W. Butler

FROM: Donnie L. Hilliard s/s Donnie L. Hilliard

SUBJECT: SIX MONTHS EVALUATION

The six months evaluation for the position of Finance Director is now due, and I am in the process of evaluating that activity. As you recall, you were also assigned a division director's slot during this same six months period. I am trying to devise a method to combine the evaluation process for those two assignments. It is resolved in this manner.

I am going to extend your probationary period for an additional ninety days. This extension is being given to allow time for a complete evaluation of the function of division director—especially as it relates to the management aspect of the assignment.

During the next ninety days I am requesting that you concentrate on the following areas:

Leadership

Influence employees and others instead of ordering them.

Delegation

Make assignments to employees and then review the outcome, not molding and critiquing their assignments on a daily basis.

Human Relations

> Develop a mode of our cooperation and collaboration so that you will gain respect and loyalty from employees and especially the elected positions. As it relates to elected officials not getting your assignments done, it is suggested that you direct all of your detailed involvements with them through me.

As it relates to the Finance Director's assignment during this six months period of probation, you have done a superb job. You are progressing well, and I would strongly suggest that you continue to pursue the accounting system and develop an understanding of it so that we could enhance the system to provide financial reports on a monthly basis. This feat would permit us to make stronger management decisions.

If there is anything that I would classify as less than expected, it would be your attendance during the six months period you have served as Finance Director. While it is nothing major, I request that you notify this office of your schedule. On numerous occasions I have called for you only to be informed that you were out or would be in later. Instruct your staff to notify me when you are not going to be in the office, or, you can call me directly.

Thank you for your cooperation and assistance to date. We will revisit this matter for closure during the month of September or early October, 1994.

APPENDIX B

COUNTY OF ORANGEBURG
P.O. Drawer 9000, Orangeburg, S.C. 29116-9000
Telephone 803/533-1000

October 20, 1994

VIA CERTIFIED MAIL

Ms. Avis W. Butler
533-G Coachman Drive
Sumter, South Carolina 29154

Dear Ms. Butler:

On October 11th your letter dated October 7, 1994, to me was delivered to the Clerk for County Council. In your letter you have requested a grievance before Council. On October 17th, County Council discussed your request for a grievance and voted to deny your request for the following reasons.

According to the Orangeburg County Code of Ordinances, Section 2-248, an employee has ten (10) calendar days in which to present a grievance. Additionally, under the same section the grievance procedure is available only to regular employees and is not available to probationary employees. Your discharge from employment with Orangeburg County occurred on September 23rd. The grievance request was not presented until October 11th as stated above. Accordingly, the grievance request was not within the ten (10) day period. Additionally, at the time of your discharge you were still deemed to be a probationary employee. For these reasons, your grievance must be denied.

Sincerely,

/s/ Vernon Ott
Vernon Ott, Jr., Chairman
Orangeburg County Council

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Case No. 5:97-1412-06BC

AVIS BUTLER,

Plaintiff,

-VS-

COUNTY OF ORANGEBURG, SOUTH CAROLINA, and DONNIE L. HILLIARD IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES,

Defendants.

DEPOSITION OF: MS. AVIS BUTLER
November 17-18, 1997

* * * *

[109] Q. Would that be then what you told the Employment Security Commission?

A. No. Because I wrote this on their behalf. And so this document dated [110] October 7, Exhibit Number 2, was written as a result of my conversation with them.

Q. With who?

A. With the unemployment people.

Q. Your letter to Vernon Ott was written for the Employment Security Commission?

A. It was written as a result of my conversation with them. I had just left their offices. And they had received the information, both the termination and probationary

letters from Bill Clark. And I said to them, I said now since you've received that, I now have a formal means of complaining to Mr. Ott. That's what I said to them. And she said she would give me 48 hours to get that information together.

* * * *

[119] Q. Do you know whether or not there was any policy of allowing employees to comment, to provide written coments or rebuttals to evaluations?

A. Not on probationary evaluations. There were none.

Q. Did you petition County Council to overturn the extension of your probationary period?

A. You can't do that as a probationary employee.

Q. Did you file any sort of lawsuit or any [120] other kind of complaint about the extension of your probationary period?

A. Yes. When I filed this suit which included my probationary period and my termination. Yes.

Q. So is it your testimony then that this litigation inc'udes a claim of wrongful extention of a probationary period?

A. Probationary and termination and subsequent termination.

Q. Those are two separate issues aren't they?

A. As a probationary employee, you don't have any rights to do anything. So you have to wait until you get the opportunity to do something. When I was terminated, I mean my adverse action first started with the probationary. Taking my rights away from me to do this.

* * * *

APPENDIX D

DEFENDANTS' FIRST RESPONSE TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION

* * * *

3. For each person known to the party or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

Answer: Mr. Hilliard is the County Administrator and a named defendant. He is expected to deny the material allegations of the amended complaint and testify that he extended plaintiff's probationary period and terminated her employment because of performance deficiencies.

Mr. Clark is the Assistant County Administrator and Personnel Director. He is expected to testify that after plaintiff came to him in July of 1994 and reported that Janella Shuler had told plaintiff that Mr. Hilliard had sexually harassed Donna Livingston, he investigated plaintiff's report and found it to be without any substance.
* * *

* * * *